ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

OSU FOUNDATION REAL ESTATE, LLC, an Oklahoma Limited Liability Company,

Plaintiff/Appellee,

vs.

MARK SARNO and BRIAN HOBBS,

Defendants/Appellants,

and

UNITED STATES OF AMERICA, ex rel. the Department of Justice; CARLA MANNING, COUNTY TREASURER, PAYNE COUNTY, OKLAHOMA; BOARD OF COUNTY COMMISSIONERS, PAYNE COUNTY, OKLAHOMA,

Defendants,

and

MARK SARNO and BRIAN HOBBS,

Counterclaimants and Cross-claimants,

and

Case No. 119,655

OKLAHOMA STATE UNIVERSITY)
FOUNDATION,)
)
Cross-Defendant.)

APPEAL FROM THE DISTRICT COURT OF
PAYNE COUNTY, OKLAHOMA

HONORABLE STEPHEN R. KISTLER, TRIAL JUDGE

AFFIRMED

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OPINION BY JOHN F. FISCHER, JUDGE:

In this mortgage foreclosure action, Mark Sarno and Brian Hobbs appeal the judgment and related rulings in favor of Plaintiff OSU Foundation Real Estate, LLC (OSU Real Estate) and third-party defendant Oklahoma State University Foundation (OSU Foundation) (collectively, OSU unless otherwise noted).[1] The

[1] The two entities appear to be affiliated and have common interests in this litigation. Any differences are not material to this appeal.

appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S.2021, ch. 15, app. 1, and submitted without appellate briefing. Sarno and Hobbs have failed to show that the district court erred in granting OSU Real Estate's motion for partial summary judgment and foreclosing its mortgage on property purchased by Sarno and Hobbs. Consequently, Sarno and Hobbs have failed to show that the district court erred in denying their motion for new trial. In addition, they are also precluded from changing their position with regard to the factual basis for their counterclaim and, therefore, cannot show that the district court erred in dismissing that claim without leave to amend. The rulings appealed are affirmed.

BACKGROUND

The house that is the subject of this litigation was built in 2004. Sarno and Hobbs approached the original owner about purchasing the property in 2016 but were unable to agree on a price. OSU acquired ownership of the property from the original owner and spent significant funds to repair and/or improve the property. It did so in anticipation that the property would become the residence of the University's president.

When plans for the property changed, OSU contacted Sarno and Hobbs about their interest in the property. In December of 2016, OSU leased the property to Sarno and Hobbs. In March of 2018, Sarno and Hobbs signed a contract to

purchase the property from OSU for $1,118,600. The purchase price was adjusted by deducting $218,600 as an allowance to Sarno and Hobbs for further repairs to the property. Sarno and Hobbs acknowledged in the sales agreement that they were buying the property "as is with all faults" and "subject to any known or unknown defects." On April 2, 2018, Sarno and Hobbs signed a promissory note secured by a mortgage on the property in the amount of $875,000 to finance their purchase of the property from OSU Real Estate.

When Sarno and Hobbs failed to pay the promissory note according to its terms, OSU Real Estate, the holder of the note and mortgage, filed this action. Sarno and Hobbs answered and filed a counterclaim against OSU Real Estate and a third-party claim against OSU Foundation, styled as a "cross-claim" (collectively counterclaim).[2] Sarno's and Hobbs' counterclaim asserted a violation of the Oklahoma Residential Property Condition Disclosure Act (60 O.S.2021 §§ 831 through 839). Subsequently, OSU Real Estate filed a motion for summary judgment seeking to collect the note and foreclose the mortgage. OSU Real Estate also sought summary judgment with respect to Sarno's and Hobbs' counterclaim. OSU Foundation joined in OSU Real Estate's motion.

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[2] Because OSU Foundation was not originally a party to this action, Sarno's and Hobbs' claim is not a "cross-claim" but a third-party claim. *See* 12 O.S.2021 § 2007(A)("There shall be . . . a third-party petition, if a person who was not an original party is summoned . . . .").

According to an April 16, 2021 court minute, the district court held a hearing on OSU's motion, granted the motion in part, denied the motion with respect to Sarno's and Hobbs' counterclaim and third-party claim, and entered judgment for OSU Real Estate with respect to its action to collect the note and foreclose the mortgage. The court also determined there was no just reason to delay that aspect of the case and entered the judgment in favor of OSU Real Estate as a final judgment pursuant to 12 O.S.2021 § 994. The court also granted judgment in favor of OSU with respect to Sarno's and Hobbs' request for injunctive relief.

Before that ruling was memorialized in the Journal Entry of Partial Summary Judgment filed on May 21, 2021 (the Foreclosure Judgment), Sarno and Hobbs filed a "Motion to Reconsider or Alternatively, Motion to Stay." They asked the court to reconsider its judgment in favor of OSU Real Estate, contending that there were disputed issues of fact.

Sarno's and Hobbs' "'motion to reconsider' does not technically exist within the statutory nomenclature of Oklahoma practice and procedure." *Berkson v. State ex rel. Askins*, 2023 OK 70, ¶ 12, 532 P.3d 36, 43.[3] A motion seeking

[3] *See Smith v.City of Stillwater*, 2014 OK 42, ¶ 10, 328 P.3d 1192, 1197 (explaining that a "'motion to reconsider' may be treated as a motion for new trial under 12 O.S. § 651 (if filed within ten (10) days of the filing of the judgment), or it may be treated as a motion to modify or to vacate a final order or judgment under the terms of 12 O.S. §§ 1031 and 1031.1 (if filed after then (10) days but within thirty (30) days of the filing of the judgment, decree, or appealable order)."

reconsideration of a judgment, which is filed within ten days of the day the judgment was rendered, "may be regarded as the functional equivalent of a new trial motion, no matter what its title." *Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, ¶ 4, 681 P.2d 757, 759 (footnote omitted).[4] When, as in this case, a motion for new trial is filed after the announcement of the decision but before the judgment is reduced to writing and filed in accordance with 12 O.S.2021 § 696.3, the motion "shall be deemed filed immediately after the filing of the judgment . . . ." 12 O.S.2021 § 653(C). Sarno's and Hobbs' timely filed motion for new trial was denied by an order filed on July 16, 2021.

While Sarno's and Hobbs' motion for new trial was pending, OSU Real Estate filed a motion to dismiss their counterclaim. That motion was granted in an Amended Journal Entry filed August 20, 2021, which also denied Sarno and Hobbs leave to amend their counterclaim and stated that "all outstanding causes of action in this matter, together with all affirmative defenses to those causes of action" had been adjudicated.

Sarno and Hobbs initiated this appeal prematurely on June 21, 2021. After various amendments and supplements to their initial petition in error required by

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[4] *Cf., LCR, Inc. v. Linwood Props.*, 1996 OK 73, ¶ 11, 918 P.2d 1388, 1393 (a motion challenging a partial summary adjudication not certified as final pursuant to 12 O.S. § 994 is not a 12 O.S. § 651 motion for new trial but a motion addressing a non-appealable, intermediate order subject to modification before the judgment is entered).

the Supreme Court, Sarno's and Hobbs' October 21, 2021 Reasserted Corrected Amended Petition in Error was accepted by the Supreme Court and this appeal was allowed to proceed.[5]

STANDARD OF REVIEW

Three rulings are submitted for appellate review in this accelerated proceeding: the May 21, 2021 Foreclosure Judgment, the July 16, 2021 Order denying Sarno's and Hobbs' motion for new trial, and the August 20, 2021 Amended Journal Entry dismissing their counterclaim and cross-claim without leave to amend. Those three rulings are governed by separate standards of review.

Summary judgment "is a pretrial procedure available where the evidentiary materials, such as affidavits, admissions, answers to interrogatories, and depositions, establish each and every material fact necessary to support a judgment as a matter of law." *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶ 11, 160 P.3d 959, 963 (citing *Manley v. Brown*, 1999 OK 79, ¶ 22, 989 P.2d 448, 455-56).

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[5] A subsequent request to amend the October 21, 2021 corrected petition in error was denied by the Supreme Court on December 22, 2021. The October 21, 2021 corrected petition in error was filed pro se, after Sarno's and Hobbs' previous counsel was allowed to withdraw. Nonetheless, Sarno and Hobbs were represented by counsel in the district court when all of the rulings which are the subject of this appeal were rendered. They were also represented during the initial part of this appeal, including when the record in this accelerated appeal was prepared and filed. This appeal was delayed when, in February of 2022, Hobbs filed a petition for bankruptcy in the United States District Court for the Western District of Oklahoma and the federal Bankruptcy Court stayed all state court litigation, including this appeal. This appeal was allowed to proceed after the stay was lifted.

We review the district court's grant of summary judgment de novo. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053.

The abuse of discretion standard governs appellate review of the denial of a motion for new trial, even when it is "denominated erroneously as a motion for reconsideration of the judgment . . . ." *Bank of Okla., N.A. v. Red Arrow Marina Sales & Serv., Inc.*, 2009 OK 77, ¶ 11, 224 P.3d 685, 693. However, when the denial of a motion for a new trial "rests on the propriety of the earlier summary judgment, we settle the abuse-of-discretion question by a de novo review of the summary adjudication's correctness." *Reeds v. Walker*, 2006 OK 43, ¶ 9, 157 P.3d 100, 107. When a motion for new trial is filed and overruled, "the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted." 12 O.S.2021 § 991(b).

The purpose of a motion to dismiss for failure to state a claim is to test the law that governs the claim rather than the facts asserted in support of that claim. *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 23-24. On review of an order dismissing a petition all allegations in the petition are taken as true. *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565, 569-70. Appellate review of a motion to dismiss involves a de novo consideration as to whether the

petition is legally sufficient. *Indiana Nat'l Bank v. Dep't of Human Servs.*, 1994 OK 98, ¶ 2, 880 P.2d 371, 375.

Ultimately, the de novo standard governs appellate review of all three rulings that are the subject of this appeal. De novo review is independent and non-deferential to the rulings of the district court. *Neil Acquisition L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100, 1103.

ANALYSIS

As stated, Sarno and Hobbs seek review of the May 21, 2021 Foreclosure Judgment, the July 16, 2021 Order denying their motion for new trial, and the August 20, 2021 Amended Journal Entry dismissing their counterclaim and cross-claim.

I. Judgment on the Note and Mortgage

The first two assignments of error in Sarno's and Hobbs' corrected petition address the Foreclosure Judgment:

> (1) Whether the District Court erred in its May 21, 2021 Order by entering partial summary judgment in favor of Plaintiff OSU Foundation Real Estate, LLC when there were still unresolved issues of material fact.
> (2) Whether the District Court erred in denying Appellants' Motion to Reconsider or Alternatively, Motion to Stay.

The "unresolved issues of material fact" regarding the note and mortgage are not identified, nor is there any explanation as to why the district court erred in denying their motion for new trial.

An "assignment of error should designate the allegations of error clearly so that the court and opposing parties may ascertain the issues raised . . . ." *Markwell v. Whinery's Real Estate, Inc.*, 1994 OK 24, ¶ 6, 869 P.2d 840, 842. "A petition in error is examined using a substantial compliance analysis to determine its sufficiency to give a required notice to opposing parties." *Berkson v. State ex rel. Askins*, 2023 OK 70, ¶ 17, 532 P.3d 36, 45. "[A] mere assertion, in general terms, that the ruling of the trial court is wrong will not be considered as having been made." *Peters v. Golden Oil Co.*, 1979 OK 123, ¶ 3, 600 P.2d 330, 331. Supreme Court Rule 1.301, Form No. 5, "requires the appellant to '[i]nclude each point of law alleged as error,' and cautions: 'Avoid general statements such as 'Judgment not supported by law.'" *Vanguard Env't Inc. v. Curler*, 2008 OK CIV APP 57, ¶ 5, 190 P.3d 1158, 1161 (footnote omitted). However, assignments of error may be "clarified" in Exhibit B, the Summary of Case, to a petition in error. *Markwell*, 1994 OK 24, ¶ 7, 869 P.2d at 842-43.

In their Summary of Case, Sarno and Hobbs argue that, if the district court found that disputes of material fact regarding the disclosure of hail damage precluded summary judgment with respect to their counterclaim, disputed facts should have also prevented summary judgment on the note and mortgage because both claims involved identical facts. Sarno and Hobbs characterize the asserted failure to disclose hail damage as "fraud" which they contend is always a question

of fact. Although Sarno and Hobbs cite controlling authority supporting their legal position that fraud is a question of fact, they do not address why that question of fact cannot be resolved in a summary proceeding or why it was necessarily "material" to OSU Real Estate's motion for summary judgment on the note and mortgage. A fact is only "'material' if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Hadnot v. Shaw*, 1992 OK 21, ¶ 18, 826 P.2d 978, 985-86.

Further, appellate review of this issue is limited by the issues raised in Sarno's and Hobbs' motion for new trial. 12 O.S.2021 § 991(b); *Indep. Sch. Dist. No. 52 of Okla. Cnty. v. Hofmeister*, 2020 OK 56, ¶ 13, 473 P.3d 475, 484 ("[T]he issues on appeal are limited in scope to the issues before the trial court which were adjudicated on summary judgment and then preserved in plaintiffs' motion for new trial."). In that motion, Sarno and Hobbs argued that OSU knew of hail damage to windows resulting from a 2009 hailstorm and failed to disclose that damage prior to the sale in violation of the Residential Property Disclosure Act. They argued that the alleged failure to disclose the hail damage constitutes fraud which "**vitiates all contracts**." (emphasis in original). This is the only basis asserted in the motion

for new trial to "challenge the enforceability of the Note and Mortgage . . . ."[6] Appellate review of the May 21, 2021 Foreclosure Judgment is, therefore, limited to one issue: whether the alleged failure to disclose hail damage is material to OSU Real Estate's motion for judgment on the note and mortgage.

Sarno and Hobbs contend that the facts, which formed the basis for their counterclaim, arose out of "**the exact same set of operative facts**" that formed the basis of OSU Real Estate's claim on the note and mortgage. (Emphasis in original). According to Sarno and Hobbs, "it logically follows" that if the district court found disputed issues of fact precluded summary judgment as to the counterclaim, summary judgment was precluded on OSU Real Estate's claim on the note and mortgage.

Sarno's and Hobbs' "logical argument" suffers from the fallacy of the undistributed middle.[7] Although the two claims arise out of the same transaction

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[6] The motion for new trial also argues that "proof of authority" was lacking with respect to the signature of the person who signed the note and mortgage on behalf of OSU Real Estate. That issue is not raised in this appeal and, therefore, has been abandoned and will not be addressed. *See Hadnot v. Shaw*, 1992 OK 21, ¶ 7, 826 P.2d 978, 981.

[7] The undistributed middle is a logical fallacy which violates the rule of logic that requires the middle term in a valid categorical syllogism to be entirely distributed, or referred to, in the major or the minor term of the syllogism. "The justification is that the two premises [in a categorical syllogism] assert that the minor and major terms each stand in a certain relationship to the middle term. But unless at least one of the major or minor terms is said to relate to the entire class designated by the middle term, we cannot be certain that they relate to the same part of that middle term." Douglas Lind, *Logic and Legal Reasoning* 136 (The National Judicial College, 2nd ed. 2007). The formal statement of Sarno's and Hobbs' argument is:

or occurrence, not every fact material to Sarno's and Hobbs' counterclaim was essential to OSU Real Estate's claim on the note and mortgage. For example, the fact that the note was in default, a fact material to OSU's motion for summary judgment, has nothing to do with what Sarno and Hobbs were or were not told about damage to the property before they signed the note.

By limiting their appeal to this "logical" argument, Sarno and Hobbs have not challenged or shown any dispute regarding the following facts: (1) Sarno and Hobbs signed the promissory note and mortgage; (2) OSU Real Estate was the holder of the note and mortgage; (3) Sarno and Hobbs received the amount of money stated in the note to purchase the property; (4) repayment of the note was secured by the mortgage on the property; and (5) the note was in default when OSU Real Estate filed this action. Those are the only facts in this record that are "material" to the motion for summary judgment. The fact that OSU might not have disclosed hail damage may constitute a violation of the Residential Property Disclosure Act, but it does not "have the effect of establishing or refuting one of

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Disputed counterclaim facts arise from the facts of the property sale transaction.

OSU's claim arises from the facts of the property sale transaction.

Therefore, the facts of OSU's claim are disputed.

In this argument, the middle term "the facts of the property sale transaction" is not distributed because some facts in that "transaction" are material to the counterclaim but not to OSU's claim, and some facts in that "transaction" are material to OSU's claim but not to the counterclaim.

the essential elements of [OSU's] cause of action" on the note and mortgage. *Hadnot v. Shaw*, 1992 OK 21, ¶ 18, 826 P.2d 978, 985.

Because Sarno and Hobbs have failed to show that the facts material to OSU's motion for summary judgment on the note and mortgage were in dispute, they have not shown that the district court erred in granting that motion and rendering the May 21, 2021 Foreclosure Judgment. Consequently, they have failed to show that the district court erred in its July 16, 2021 order denying their motion for new trial. Those decisions are affirmed.

II. Dismissal of the Counterclaim

On June 16, 2021, OSU filed its motion to dismiss Sarno's and Hobbs' counterclaim and third-party claim. Sarno and Hobbs filed their response on July 6, 2021. However, neither of those filings is included in the record of Sarno's and Hobbs' appeal of the district court's August 20, 2021 Amended Journal Entry which dismissed their counterclaim. "The appellant bears the total responsibility for including in the appellate record all materials necessary to secure corrective relief." *Hulsey v. Mid-America Preferred Ins. Co.*, 1989 OK 107, ¶ 7, 777 P.2d 932, 936. Further, "[l]egal error may not be presumed in an appellate court from a silent record. The opposite is true. Absent a record showing otherwise, this court presumes that the trial court did not err." *Hamid v. Sew Original*, 1982 OK 46, ¶ 6, 645 P.2d 496, 497.

Consequently, appellate review of the August 20, 2021 Amended Journal Entry is limited to errors appearing in that document. In relevant part, that judgment provides:

> IT IS ORDERED, ADJUDGED AND DECREED by this Court that the Joint Motion to Dismiss is GRANTED and SUSTAINED as to all counterclaims and crossclaims alleged and presented by [Sarno and Hobbs] against [OSU]. [Sarno and Hobbs] are not granted leave to amend any claims or causes of action.

The purported errors regarding this ruling are described in the corrected petition in error as follows:

> . . . .
>
> 3. Whether the District Court erred in its August 20, 2021 Order by dismissing all counterclaims and/or cross-claims presented by Appellants when there were still unresolved issues of material fact and as the matter came on, not pursuant to a summary judgment motion, but pursuant to a motion to dismiss.
> 4. Whether the District Court erred in its August 20, 2021 Order by dismissing all affirmative defenses raised by Appellants.
> 5. Whether the District Court erred in holding that the exclusive remedy provision of the ORPCDA located at 60 O.S. § 837(F) bars Appellants' fraud claim, given that the ORPCDA does not apply: (i) as a realtor was not used in the transaction and (ii) as the Appellants did not make any written request for a disclosure statement when the specific defect at issue (i.e., hail damage) is not listed as an item for disclosure in 60 O.S. § 833.

The fourth assignment of error asserts that the district court erred in its August 20, 2021 judgment when it dismissed all affirmative defenses. Sarno's and Hobbs' affirmative defenses were disposed of in the court's May 21, 2021 Foreclosure Judgment in favor of OSU Real Estate. *See* 12 O.S.2021 § 2008(C)

("a party shall set forth" affirmative defenses in the party's answer to the petition). In its August 20, 2021 judgment, the district court noted that "all affirmative defenses" had been previously adjudicated. It did not rule on those affirmative defenses in its August 20, 2021 judgment dismissing Sarno's and Hobbs' counterclaim. Further, dismissal of Sarno's and Hobbs' affirmative defenses was not an error they asserted in this appeal with respect to the May 21, 2021 Foreclosure Judgment. Therefore, it is not grounds for reversal of that ruling, much less the unrelated August 20, 2021 judgment which did not dispose of their affirmative defenses. *See Hadnot v. Shaw*, 1992 OK 21, ¶ 7, 826 P.2d 978, 981.

The fifth assignment of error is specifically directed to the August 20, 2021 judgment. First, Sarno and Hobbs argue that the district court erred in finding that their fraud claim based on the failure to disclose hail damage was precluded by "the exclusive remedy provision" of 60 O.S.2021 § 837(F). The referenced statute provides:

> This act applies to, regulates and determines rights, duties, obligations and remedies at common law or otherwise of the seller, the real estate licensee and the purchaser with respect to disclosure of defects in property and supplants and abrogates all common law liability, rights, duties, obligations and remedies therefore.

We do not reach the exclusivity of the Residential Property Disclosure Act because we find nothing in the district court's August 20, 2021 judgment referencing the

Residential Property Disclosure Act, the exclusivity of section 837(F), or any statement in that judgment dismissing the counterclaim on that basis.

Second, throughout this litigation, Sarno and Hobbs have invoked the provisions of the Residential Property Disclosure Act as the basis for their counterclaim. For example, in their motion for new trial they argued that the hail damage was a "defect" required to be disclosed by the Act and Oklahoma Uniform Jury Instruction No. 30.1. OUJI-CIV 30.1, "Residential Real Property – Introduction." They also argued that the Act "mandates the standards that sellers must comply with when selling residential property in Oklahoma," and that their Residential Property Disclosure Act violation claim "**arises from the exact same set of operative facts** as the formation of the Note and Mortgage." (Emphasis in original). Further, the "Second Cause of Action" in Sarno's and Hobbs' counterclaim is described as "For Violation of the Residential Property Condition Disclosure Act." That claim is supported by the following allegation:

> 57. The disclosure statement, Exhibit "2", hereto, delivered to [Sarno and Hobbs] by [OSU] before the sale was consummated failed to disclose the water leakage of the wall of windows caused by hail damage as required by 60 O.S. § 833 when [OSU] knew of this damage.

Inexplicably, in this appeal they now contend that the Act "does not apply: (i) as a realtor was not used in the transaction and (ii) as the Appellants did not make any written request for a disclosure statement when the specific defect at

issue (i.e., hail damage) is not listed as an item for disclosure in 60 O.S. § 833." Sarno and Hobbs are precluded from arguing the proposition raised in their fifth assignment of error. *Bank of the Wichitas v. Ledford*, 2006 OK 73, ¶ 23, 151 P.3d 103, 112 (recognizing that the doctrine of judicial estoppel provides: "a party who has knowingly assumed a particular position dealing with matters of fact is estopped from assuming an inconsistent position to the detriment of the adverse party"). "The doctrine [of judicial estoppel] applies to inconsistent positions assumed in the course of the same judicial proceeding . . . ." *Id.*

We do not know on what basis Sarno and Hobbs argued to the district court that their counterclaim should not be dismissed because they did not include that filing in the appellate record. We do know that they asked the district court to reconsider the Foreclosure Judgment because their counterclaim, based on an alleged violation of the Residential Property Disclosure Act, arose from the exact set of facts as OSU's claim on the note and mortgage. The record shows that this factual position was the basis for the district court's ruling on Sarno's and Hobbs' motion for new trial and on OSU's motion to dismiss their counterclaim. Judicial estoppel applies. *Id.* ¶ 23, 151 P.3d at 112, n.30.

Finally, from the analysis of Sarno's and Hobbs' argument regarding the Foreclosure Judgment on the note and mortgage, it appears that the "unresolved issues of material fact" referred to in the third assignment of error concern

disclosures regarding hail damage to the property prior to the sale. We assume, for purposes of reviewing the dismissal of their counterclaim, that hail damage was not disclosed. *See Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565, 568-69. However, the Summary of Case does not add any argument specific to the August 20, 2021 judgment or raise any appellate issue regarding Sarno's and Hobbs' allegation that is not resolved by our affirmance of the district court's May 21, 2021 Foreclosure Judgment and our disposition of Sarno's and Hobbs' appeal of the August 20, 2021 judgment dismissing their counterclaim.

Sarno and Hobbs have failed to show any error by the district court in granting OSU's motion to dismiss their counterclaim, and the court's August 20, 2021 Amended Journal Entry is affirmed.

CONCLUSION

The record on appeal establishes that OSU Real Estate was entitled to judgment as a matter of law in this action to collect the unpaid promissory note signed by Sarno and Hobbs and to foreclose the mortgage they executed on the property to secure repayment of the note. The district court's May 21, 2021 Journal Entry of Partial Summary Judgment is affirmed. Consequently, the district court did not err in its July 16, 2021 Order denying Sarno's and Hobbs' motion for new trial and that order is affirmed. Finally, Sarno and Hobbs have failed to preserve for appellate review any argument that would require reversal of the

district court's August 20, 2021 Amended Journal Entry which dismissed their counterclaim without leave to amend.

AFFIRMED.

BLACKWELL, P.J., and HUBER, J., concur.

BLACKWELL, P.J., with whom HUBER, J., joins, concurring specially:

I agree with the Court's opinion but write separately to note that I would not treat the appellants' motion for reconsideration as if it were a motion for new trial. The motion does not invoke the new trial statute, occurred after a partial summary judgment was granted prior to trial, and, simply put, does not seek a new trial. Although the Supreme Court has said that we *may* treat such motions as if they were seeking a new trial, *see, e.g., Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, ¶ 4, 681 P.2d 757, 759, it has never said we must. *See Kerr v. Clary*, 2001 OK 90, ¶ 7, 37 P.3d 841, 843 (noting that such a construction is "permissive rather than mandatory"). Because of the default that may occur when a motion for new trial is filed, *see* 12 O.S. § 991(b), we should be cautious before treating a motion that is not clearly seeking a new trial as if it were.

When the option to treat motions to reconsider (and the like) as if they were seeking a new trial originated, we were governed by a prior statutory regime wherein *only* a timely filed motion for new trial could extend the time to appeal from an underlying judgment. *See* Backer, *Civil Wars: Stays of Execution,*

Appellate Sanctions and the Nature of Consensus on the Utility of Appellate Review, 29 Tulsa L.J. 65, 82 & nn.48-49 (1993). Of course, under our current regime *any* post-trial motion that seeks to undo a judgment, decree, or final order extends appeal time. 12 O.S. § 990.2. Given this statutory change, we should retract to a neutral position regarding the question of whether any particular motion is a motion for new trial. The rule should be that only those post-trial motions actually seeking a new trial should be treated as motions for new trial. Certainly, if given the option between treating a "motion to reconsider" as made under 12 O.S. § 651 (motion for new trial) or 12 O.S. § 1031.1 (term-time motion to vacate), as we have here, we should opt to view the motion under § 1031.1, and thus avoid any potential default.

Nevertheless, because I view the Court's opinion as having fully considered, and properly affirmed, each of the trial court's orders under review, I concur.

November 15, 2023