STATE OF MINNESOTA
IN COURT OF APPEALS
A11-211

Robert S. LaMont, et al.,
Respondents,

vs.

Premier Bank Minnesota,
Appellant.

Filed October 11, 2011
Reversed and remanded
Johnson, Chief Judge
Concurring specially, Minge, Judge

Wright County District Court
File No. 86-CV-10-4272

Lee A. Henderson, Hessian & McKasy, P.A., Minneapolis, Minnesota (for respondents)

Thomas C. Atmore, Thomas W. Newcome III, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Chief Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

The question in this appeal is whether the obligations of a borrower and two guarantors may be discharged by a lender's repossession of collateral and an appraisal

that values the collateral at an amount greater than the outstanding balance on the loan. We conclude that, in light of the written agreements of the parties, the borrower's and guarantors' obligations may not be discharged in such a manner in this case. Therefore, we reverse the district court's grant of summary judgment to the borrower and guarantors and remand for further proceedings.

FACTS

Chelsea Road LLC is a real-estate development company. Its principal and sole member is Robert S. LaMont. In 2006, Chelsea Road sought to develop commercial property near Interstate Highway 94 in the city of Monticello. In April of that year, Chelsea Road entered into a series of agreements with Premier Bank to finance the acquisition and development of the property. Chelsea Road entered into a loan agreement in the amount of $3.8 million, which provided that money would be advanced as needed. Chelsea Road was obligated to make monthly interest payments and to pay off the loan in full within one year.

Chelsea Road's loan was secured by a mortgage on the property to be developed. LaMont also provided a personal guarantee of Chelsea Road's debt to the bank. LaMont's wife executed an identical guarantee agreement. Both guarantee agreements were secured by a mortgage on the LaMonts' residence, which secured $400,000 of their guarantees and could be released by the payment of that amount.

On the same day that Chelsea Road and the LaMonts entered into these financing agreements, Chelsea Road acquired the property for $2.4 million, using a $2 million

advance on the note. Chelsea Road then began to develop the property by platting it and installing infrastructure.

Chelsea Road did not repay the loan within one year, as required by the loan agreement. In May 2008, the bank deemed Chelsea Road to be in default and informed Chelsea Road that the bank no longer would advance money under the note. At that time, the balance due was approximately $2.6 million. Without additional funding, Chelsea Road was unable to complete the development. Chelsea Road listed the property for sale, "as is," at $3.35 million.

On June 30, 2008, the bank, Chelsea Road, and the LaMonts entered into a 13-page forbearance agreement. The primary benefit for Chelsea Road and the LaMonts is contained in paragraph 2(a), which provides that, until December 31, 2008, the bank

> will temporarily forbear exercise of its foreclosure and similar remedies under the Loan Documents and applicable law so as to grant Borrower during the Foreclosure Period the right to possess and market the Collateral, the opportunity to find a purchaser of the Collateral and/or refinance in order to repay in full all indebtedness now or hereafter owing Lender under the Loan Documents.

The forbearance agreement also states, in paragraph 2(d), that the bank does not waive its rights under the loan agreement by entering into the forbearance agreement:

> The Obligors hereby expressly agree and acknowledge that by entering into this Agreement and by Lender (or Lender's designee) taking subsequent possession and/or title to the Collateral provided in this Agreement, *Lender has not agreed to cancel or cause the cancellation of the secured obligations, or to cause the cancellation, termination or waiver of the Collateral documents nor any of the other Loan Documents, but has only agreed to grant temporary forbearance as provided in Section 2(a) above and upon the*

> *satisfaction of certain terms and conditions* described in Section 4(c) hereof to grant Borrowers and Guarantors the Covenant Not to Sue described therein.

(Emphasis added.)

For the bank, the primary benefit of the forbearance agreement is contained in paragraph 3, which provides that Chelsea Road will execute a warranty deed conveying the property to the bank and that the deed will be held in escrow by a title company. And in paragraph 2(c), the forbearance agreement provides that the warranty deed will be released to the bank at the termination of the forbearance period if the secured obligations are not paid in full, which would allow the bank to record the deed and thereby take title to the property. The parties further agreed, in paragraph 4(c), that if the warranty deed were delivered to the bank and recorded, the obligations of Chelsea Road and the LaMonts would be limited to $300,000, if certain conditions were satisfied. Specifically, the parties agreed that the bank would limit its right to a deficiency recovery against Chelsea Road to $300,000 and would not seek to collect more than $300,000 on the LaMonts' guarantees or their mortgage, so long as Chelsea Road, LaMont, and LaMont's wife executed confessions of judgment, jointly and severally, in that amount.

Paragraph 4(a) of the forbearance agreement preserves for Chelsea Road and the LaMonts the option of satisfying their obligations to the bank during the forbearance period by paying cash:

> If on or before the Forbearance Termination Date, the Obligors pay to Lender in *immediately available funds* all secured obligations then due and owing to Lender under the Loan Documents, Lender will deliver to the Obligors executed Satisfactions and Releases terminating all Lender's

> rights under the Loan Documents (including specifically the Residential Mortgage) and in addition, Lender will direct the Escrow Agent under the Escrow Agreement to release the Obligors all Escrow Documents, thereby revesting title to the Real Property in Borrower and (if applicable the Guarantors).

(Emphasis added.)

The final paragraph of the forbearance agreement, paragraph 20(g), states that, "[e]xcept as expressly otherwise provided herein, the terms and conditions" of the 2006 loan agreement "shall remain in full force and effect."

Chelsea Road did not sell the property by December 31, 2008, and the forbearance period terminated that day. On February 4, 2009, the bank directed the escrow agent to release the deed. On February 10, 2009, the bank recorded the deed in Wright County. On February 13, 2009, the bank obtained an appraisal stating that the fair market value of the property is $2.9 million. [1] This appraisal exceeded the outstanding loan balance of $2.6 million.

On February 24, 2009, the bank asked the LaMonts to sign confessions of judgment that would limit their joint obligation to $300,000, as provided in paragraph 4(c) of the forbearance agreement. The LaMonts refused to sign the confessions of judgment on the ground that the outstanding balance of the loan had been satisfied because the bank had repossessed the property and the property had been appraised at

[1]The bank asserts that it requested an appraisal because an appraisal is required by banking regulations. The bank's assertion is based on an affidavit of one if its officers, who further stated that the bank is required to establish a valuation of repossessed property for internal accounting purposes so that the property can be factored into the bank's capital requirements. The bank has not cited the applicable regulations, but respondents have not challenged the bank's assertion or this part of the bank officer's affidavit.

$2.9 million. The LaMonts asked the bank to release the mortgage on their residence, but the bank refused on the ground that the LaMonts had not complied with the requirements of the forbearance agreement and remained liable under their personal guarantees.

In May 2010, Chelsea Road and the LaMonts commenced this action in the Wright County District Court. They sought an order requiring the bank to release the mortgage on the ground that the bank's repossession and subsequent appraisal satisfied the outstanding balance of the loan. In September 2010, Chelsea Road and the LaMonts moved for summary judgment. In January 2011, the district court granted their motion, concluding that the LaMonts' personal guarantees were satisfied. The bank appeals.

D E C I S I O N

The bank argues that the district court erred by granting summary judgment to Chelsea Road and the LaMonts. A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[ ] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to a grant of summary judgment, and we view the evidence in the light

most favorable to the non-moving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

I.

Before considering the merits of the bank's appeal, we must consider the LaMonts' argument that the appeal is moot, in part. The LaMonts argue that the bank's appeal is moot to the extent that the bank wishes to enforce the mortgage on the LaMonts' residence because the LaMonts have recorded the district court judgment. Accordingly, the LaMonts argue that the appeal is justiciable only to the extent that the bank wishes to enforce the LaMonts' personal guarantees.

The district court administrator entered judgment on January 6, 2011. The bank sought a stay of enforcement of the judgment pending appeal on February 4, 2011. Four days later, the LaMonts recorded the district court judgment. On March 9, 2011, the district court denied the bank's request for a stay on the ground that the request was moot because the LaMonts already had recorded the judgment. The bank also sought a stay from this court. On May 6, 2011, a special term panel of this court granted the bank's motion for a stay of enforcement of the judgment. The special term panel rejected the district court's conclusion that the LaMonts' recording of the judgment mooted the bank's request for a stay. We reasoned that the bank could obtain effective relief on appeal if this court were to determine that the district court erred in its ruling on the summary judgment motion. Accordingly, the special term panel granted a stay and remanded the matter to the district court for a determination of the appropriate terms and conditions of a stay pending appeal.

The bank's appeal is not moot with respect to the mortgage on the LaMont's residence for essentially the same reasons that the bank's request for a stay was not moot. An appeal may be moot if a court is unable to grant effective relief. *Enright v. Lehmann*, 735 N.W.2d 326, 330 (Minn. 2007). But this court is not deprived of its ability to grant effective relief merely by the LaMonts' recording of the district court judgment. If this court reverses the district court's ruling, the recorded judgment no longer is effective. The LaMonts rely on *Foster v. Coughren*, 113 Minn. 433, 129 N.W. 853 (1911), which states that a "judgment recorded under . . . section [507.26] must, in the absence of anything indicating a different purpose, be given the same effect as notice that is given to the record of instruments generally under the recording acts." *Id.* at 437, 129 N.W. at 854. But the judgment in *Foster* was a final judgment, whose validity was beyond question. In this case, the district court's judgment is being challenged on appeal. An appeal such as this one could have become moot if the property had been transferred. *See Chaney v. Community Development Agency*, 641 N.W.2d 328, 335 (Minn. App. 2002), *review denied* (Minn. May 28, 2002). But the property had not been transferred at the time of proceedings before the special term panel, and the stay imposed at that time presumably has prevented any such transfer. Thus, we may proceed to consider the substance of the bank's appeal.

II.

The bank argues that the district court erred by determining that Chelsea Road has satisfied its obligation to repay the loan on the ground that the bank repossessed the property and the fact that the bank obtained an appraisal of the property that exceeds the

outstanding balance of the loan. The bank's argument requires us to interpret the parties' contracts. "The primary goal of contract interpretation is to ascertain and enforce the intent of the parties." *Valspar Refinish*, 764 N.W.2d at 364. If a contract is "clear and unambiguous," a court "should not rewrite, modify, or limit its effect by a strained construction." *Id.* at 364-65. Rather, a court "must deduce the parties' intent from the language used." *Metropolitan Sports Facilities Comm'n v. General Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991). "The plain and ordinary meaning of the contract language controls, unless the language is ambiguous." *Business Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). Contractual language is ambiguous "if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning." *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 351, 205 N.W.2d 121, 123 (1973). We apply a *de novo* standard of review to the question whether a contract is ambiguous. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). If a contract is "clear and unambiguous," a court "should not rewrite, modify, or limit its effect by a strained construction." *Valspar Refinish*, 764 N.W.2d at 364-65.

In analyzing the summary judgment motion, the district court began its analysis by defining the issue as whether the bank's repossession of the property "satisfies [Chelsea Road and the Lamonts'] obligations since a contemporaneous appraisal establishes a value of the surrendered collateral in excess of the amount of the debt." The district court also framed the issue as "when to determine a deficiency after a forbearance agreement expires and a creditor obtains title to property by a deed in lieu of foreclosure." The district court looked to caselaw for guidance but reasoned that all similar cases were

distinguishable. Ultimately, however, the district court relied on *State Bank of Young America v. Fabel*, 530 N.W.2d 858 (Minn. App. 1995), *review denied* (Minn. June 29, 1995), for the proposition that there no longer was an outstanding debt. Accordingly, the district court granted summary judgment to Chelsea Road and the LaMonts and released the mortgage on the LaMonts' residence.

The district court's analysis is inconsistent with the terms of the parties' agreements. The loan agreement requires Chelsea Road to repay the loan. The forbearance agreement states that the "terms and conditions" of the loan agreement "shall remain in full force and effect," "[e]xcept as expressly otherwise provided herein." The forbearance agreement states that the LaMonts may discharge their personal guarantees in one of two ways: by paying cash to the bank during the forbearance period or by signing confessions of judgment after the forbearance period. These are the terms of the parties' written agreements, and no argument is advanced that they are not permitted by law.

Furthermore, no provision of the forbearance agreement permits Chelsea Road or the LaMonts to satisfy their obligations to the bank through the bank's repossession and subsequent appraisal of the property. To the contrary, the forbearance agreement states that the bank "has not agreed to cancel or cause the cancellation of the secured obligations, or to cause the cancellation, termination or waiver of any of the Collateral documents nor any of the other Loan Documents." Furthermore, the forbearance agreement states, "If the Real Property is transferred to Lender . . . it will not be accepting transfer of the Real Property in satisfaction, termination or waiver of any

obligations under the Loan Documents." The district court's order granting the summary judgment motion is inconsistent with these contractual provisions because the order effects the cancellation of the secured obligations and requires the bank to accept the property in full satisfaction of the respondents' contractual obligations.

In sum, Chelsea Road and the LaMonts did not satisfy their contractual obligations to the bank by the bank's repossession of the property and the appraisal of the property at a value that exceeds the balance of Chelsea Road's loan. The parties' agreements do not provide that Chelsea Road and the LaMonts may discharge their contractual obligations by such means. Thus, the district court erred by granting summary judgment to the Chelsea Road and the LaMonts and releasing the mortgages on the LaMonts' residence. The bank is entitled to an opportunity to prove its right to a judgment against Chelsea Road and the LaMonts, after it has disposed of the property, at which time the actual amount of any deficiency may be determined. Accordingly, the matter is remanded to the district court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MINGE, Judge (concurring specially)

I join in the opinion of the court and write separately to emphasize that the LaMonts as debtors are entitled to a reasonable valuation of the collateral conveyed to Premier Bank, that that valuation should be a credit against their indebtedness, and that the valuation should be within a reasonable timeframe. The valuation process should be evenhanded and transparent. Ideally, it would be governed by agreement of the parties.

The LaMonts are not entitled to rely on an internal bank valuation done for other purposes. But, the valuation process was not resolved by this appeal. Rather, the implication from the record is that the parties assumed that the bank's loss would exceed the $300,000 payment obligation of the LaMonts and that the $300,000 figure was a concession to the LaMonts.