STATE OF MINNESOTA
IN COURT OF APPEALS
A11-407

Commerce Bank,
Respondent,

vs.

Manley Commercial, Inc., et al.,
Defendants,

Brookings Associates, et al.,
Appellants,

Cobb Strecker Dunphy & Zimmermann, Inc.,
Co-Appellant.

Filed December 27, 2011
Reversed and remanded
Hudson, Judge

Dakota County District Court
File No. 19HA-CV-10-329

Mathew M. Meyer, Moss & Barnett, Minneapolis, Minnesota (for respondent)

Manley Commercial, Inc., Burnsville, Minnesota (defendants)

Larry A. Frost, Paladin Law, PLLC, Bloomington, Minnesota (for appellants)

Eric W. Forsberg, Forsberg Law Office, P.A., Minneapolis, Minnesota (for co-appellant)

Considered and decided by Hudson, Presiding Judge; Wright, Judge; and Worke, Judge.

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

HUDSON, Judge

Appellants, judgment creditors of defendant property owner, challenge the district court's summary judgment concluding that their judgment liens were junior to respondent bank's mortgage when a partial release of that mortgage was erroneously recorded without an attachment denoting the portion of the land released. Because the district court erred by applying the doctrine of mutual mistake to the recording error and a genuine issue of material fact exists as to whether appellants were placed on constructive or inquiry notice of the recording error, we reverse and remand for further proceedings.

FACTS

In February 2007, respondent Commerce Bank issued a $1,425,000 loan to defendant Manley Commercial, Inc., a commercial development company. The loan was secured by a first-priority mortgage on a tract of commercial property. The mortgage was modified in March 2007 to reduce its principal amount to $790,000. Because the property was in part abstract and in part Torrens, the mortgage and its modification were recorded, respectively, with the Dakota County Recorder and the Dakota County Registrar of Titles. A sheet labeled Exhibit A attached to the modification described the subject property.

In June 2007, Manley contacted respondent relating to the proposed sale of a portion of the property to defendant Holiday Stationstores, Inc. As part of the transaction, a plat was required to be approved by the county, and a new certificate of title was required to be issued in connection with the Torrens portion of the property.

When the property was platted, its description changed to Lots 1 and 2, Manley Park Addition. Holiday intended to purchase Lot 1.

Because a portion of the mortgage would be satisfied as a result of the sale, respondent provided partial payoff information to Manley, Holiday, and Holiday's title company. Respondent also exchanged communications with Holiday's attorney, who drafted a document showing that Lot 1 would be released from the mortgage, but Lot 2, which was abstract property except for a five-foot Torrens strip, would remain subject to the mortgage. In October 2007, respondent's senior vice president signed the release, which stated that the mortgage was "released, relinquished, discharged and terminated with respect to that certain real estate described in Exhibit A attached hereto and made a part hereof." Exhibit A described the real estate to be released as "Lot 1, Block 1, Manley Commons First Addition, Dakota County, Minnesota."

Respondent forwarded the release, which included Exhibit A, to the title company. After the closing, the title company arranged for the release to be submitted as part of the plat application to the Dakota County Surveyor's Office. But before it was recorded or filed with the registrar of titles, Exhibit A was inadvertently detached from the release. As a result, the release was recorded without Exhibit A with both the county recorder and the registrar of titles. The county recorder made entries in the tract index indicating that the entire property had been released from the mortgage. The registrar of titles also treated the release as releasing the mortgage as to the entire property, and the mortgage was no longer memorialized on the Torrens certificate.

In 2008, Manley defaulted on its obligation to pay the note secured by the mortgage. In 2009, co-appellant Cobb Strecker Dunphy & Zimmerman, Inc. (CSDZ) obtained and docketed a judgment against Manley in the sum of $48,038.03. CSDZ registered its judgment on the certificate of title to the Torrens portion of the property. Also in 2009, appellants Brookings Associates, 1801 Riverside, LLC, and GMP II, LLC, obtained and docketed a judgment against Manley in the amount of $975,599.28. Pursuant to statute, the judgment operated as a lien against Manley's property in Dakota County. *See* Minn. Stat. § 548.09 (2010).

In 2010, respondent, having learned that its mortgage was no longer memorialized on the certificate of title, sought a judgment declaring its mortgage to be the first-priority lien against the property and for foreclosure. Appellants sought dismissal of respondent's claims and asserted counterclaims to establish their judgment liens as first-priority liens. Brookings, GMP, and 1801 Riverside also asserted affirmative defenses that included laches, waiver, and estoppel.[1]

Respondent moved for summary judgment. The district court granted summary judgment, concluding that no genuine issue of material fact existed as to the parties' intent relating to the release, and that the mortgage was intended to remain a lien on Lot 2. The district court concluded that reformation of the release to include only Lot 1, the

[1] Defendant Holiday also sought dismissal of the action. When the district court issued summary judgment, the district court noted that respondent's lien did not affect Holiday's interest, which was described in an easement and restriction agreement, to which respondent expressly consented, and to which respondent's interest was subordinate. Respondent and Holiday then stipulated to dismissal without prejudice of any claims between them. Additional named defendants who held judgments against Manley are not represented in this appeal.

property described in Exhibit A, was appropriate, and the district court directed the registrar of titles and the county recorder to reform the release to contain the correct property description. Thus, respondent's mortgage remained the first-priority lien, and the district court ordered foreclosure of that mortgage. CSDZ requested reconsideration, which was denied, and the various appellants bring this appeal.

D E C I S I O N

I

In reviewing the district court's grant of summary judgment, this court examines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court "review[s] de novo whether a genuine issue of material fact exists" and whether the district court erred in its conclusions of law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002); *see, e.g.*, *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011) (applying de novo standard of review to district court's conclusion at summary judgment that requirements for equitable remedies of rescission and reformation of agreements were not met).

Appellants argue that the district court erred by reforming the recorded release to conform to the parties' intent to release only Lot 1, the property described in Exhibit A, on the ground of mutual mistake. They point out that, once the release was recorded in

the offices of the county recorder and the registrar of titles, Commerce Bank's mortgage did not appear as a lien against any portion of the property. They argue that because they were third parties who lacked notice that the release applied only to Lot 1, their judgment liens take priority over Commerce Bank's mortgage.

A written instrument may be reformed on clear and convincing proof that: (1) a valid agreement existed between the parties expressing their real intentions; (2) the written instrument purportedly articulating that agreement failed to express the parties' real intentions; and (3) failure was attributable to the parties' mutual mistake or a unilateral mistake that was accompanied by fraud or inequitable conduct by the other party. *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980). Mutual mistake occurs when "both parties agree as to the content of the document but . . . somehow through a scrivener's error the document does not reflect that agreement." *Id.* Thus, a court may reform a deed if, through a scrivener's error, the deed does not properly reflect the intent of the parties to a transaction. *Johnson v. Giese*, 231 Minn. 258, 265, 42 N.W.2d 712, 717 (1950). In contrast, if "neither [party] misled the other, but nevertheless each party was mistaken and thought he was making a different [agreement] from what the other party supposed he was making, reformation is not an appropriate remedy." *Nichols*, 294 N.W.2d at 734.

The district court determined that, as a matter of law, the release could be reformed on the ground of mutual mistake, stating that while "[t]he third element of the *Nichols* test . . . does not strictly apply to the case now before the Court, the spirit of it does." The court noted that "it is clear what the intention of the parties was . . . [t]he

'mutual mistake' was the omission of Exhibit A from the [r]elease." The district court thus reformed the release, as recorded, to conform to its understanding of the parties' intent to release only Lot 1 from the mortgage.

But the facts submitted to the district court contain no indication that the release as executed "d[id] not reflect [the parties'] agreement." *Id*. The record shows that the release was duly executed in conformity with the parties' agreement to release only Lot 1 from the mortgage and to retain the mortgage as a lien against Lot 2. Instead, the mistake occurred when the release was inadvertently filed with the county recorder and the registrar of titles without Exhibit A. This case does not involve a written instrument that does not accurately reflect the parties' intentions. Rather, it is an error attributable to the party who failed to assure that the entire document was presented to the county for recording. And because appellants filed judgment liens against the property before the release was corrected, as intervening third parties, they may have rights that are affected by the reformation of the release, as recorded, to include Exhibit A. *See Manderfeld v. Krovitz*, 539 N.W.2d 802, 805 (Minn. App. 1995) (stating that original parties' right to reform instrument "gives way . . . to the intervening rights of persons not parties to the contract"), *review denied* (Minn. Jan. 25, 1996). We therefore conclude that the district court erred by applying the doctrine of mutual mistake and granting summary judgment in favor of respondent on this issue.

II

Appellants argue that, as judgment creditors of Manley, their judgment liens took priority over respondent's mortgage because they lacked notice of the defect in the

release. Under the Minnesota Recording Act, "[e]very conveyance of real estate shall be recorded . . .; and every such conveyance not so recorded shall be void as against . . . any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to the recording of such conveyance." Minn. Stat. § 507.34 (2010). A "bona fide purchaser" is a person "who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others." *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978). A mortgage operates as a conveyance of real estate for purposes of the recording act. *MidCountry Bank v. Krueger*, 782 N.W.2d 238, 244 (Minn. 2010). Thus, the same "bona fide purchaser" principle under the recording act also protects judgment creditors against unrecorded claims to real estate, including mortgages, if the creditors lack notice of those claims. *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 598 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997).

The district court concluded that

> had any of the judgment creditors . . . been a good faith purchaser of Lot 2, that purchaser would have had implied knowledge and constructive knowledge of the [m]ortgage. A good faith purchaser of Lot 2 would have looked into both the abstract and Torrens portion[s] of Lot 2. While the [c]ertificate of [t]itle would mistakenly [have] shown the [m]ortgage as released, reasonable inquiry of the record on the abstract portion of Lot 2 would reveal the omission of Exhibit A.

Torrens property

We agree with the district court's conclusion as to the Torrens portion of Lot 2. The Minnesota Torrens Act "abrogates the doctrine of constructive notice except as to

matters noted on the certificate of title," although it does not eliminate the effect of actual notice. *In re Petition of Willmus*, 568 N.W.2d 722, 725 (Minn. App. 1997) (quoting *In re Juran*, 178 Minn. 55, 60, 226 N.W. 201, 202 (1929)), *review denied* (Minn. Oct. 21, 1997); *see* Minn. Stat. § 508.25 (2010) (noting certain exceptions to this general rule). "Actual notice requires actual knowledge," *Willmus*, 568 N.W.2d at 726, and "[a]ctual knowledge is generally given directly to, or received personally by, a party." *Wash. Mut. Bank, F.A. v. Elfelt*, 756 N.W.2d 501, 507 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Dec 16, 2008).

Respondent has not alleged facts tending to show that appellants received actual knowledge that Lot 2 remained subject to respondent's mortgage. And because the certificate of title did not contain a reference to the mortgage, appellants may not be charged with constructive notice of the defect as it relates to the Torrens portion of the property. *Willmus*, 568 N.W.2d at 725; *cf. Nolan v. Stuebner*, 429 N.W.2d 918, 922–23 (Minn. App. 1988) (concluding that, when property owners purchased Torrens property, and certificate of title contained ambiguous reference to an easement, they were not bona fide purchasers for value because certificate of title provided record notice of easement and title opinion that confirmed existence of easement provided actual notice), *review denied* (Minn. Dec. 16, 1988).

Abstract property

Because Lot 2 also contains an abstract portion, we must also examine the requirements of notice relating to abstract property. As to abstract property, "the protection of the [recording] act is lost to creditors with actual, constructive, *or* inquiry

notice of a third party's rights in the property inconsistent with the judgment debtor's." *Nussbaumer*, 556 N.W.2d at 598 (emphasis added). "Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record." *Miller v. Hennen*, 438 N.W.2d 366, 369–70 (Minn. 1989) (quotation omitted). Regarding abstract property, "[a] recorded interest is constructive notice only of the facts appearing on the face of the record." *Id.* at 370 (quotation omitted). Thus, "[i]n order to have constructive notice of a defect in a legal description, it must be apparent from the record that there is such a defect." *Howard, McRoberts & Murray*, 382 N.W.2d 293, 296 (Minn. App. 1986); *see also Bank of Ada v. Gullikson*, 64 Minn. 91, 94–95, 66 N.W. 131, 132 (1896) (concluding that record failed to provide constructive notice of defective legal description when it failed to indicate "the particulars wherein it was defective").

Respondent argues that the release as recorded provides constructive notice that it was only a partial release of the mortgaged property because it included a reference to Exhibit A, and Exhibit A was not attached. But the abstract also contains an earlier Exhibit A, which relates to the 2007 mortgage modification and describes the whole of the subject property. Therefore, an examination of the record would not, by itself, have shown "the particulars wherein [the release] was defective" because it would not have provided constructive notice that the release did not relate to the whole of the property. *See Bank of Ada*, 64 Minn. at 94–95, 66 N.W. at 132.

Respondent also argues that the record was sufficient to place appellants on inquiry notice to further investigate the facts relating to the release. Implied or inquiry

notice has been found when a person has "actual knowledge of facts which would put one on further inquiry." *Miller*, 438 N.W.2d at 370 (quotation omitted). If "the attention of an interested party is directed to a defective deed . . . he may get actual knowledge of the facts sufficient to affect his conscience, and put him upon inquiry, so as to charge him with notice, which would not otherwise be legally attributable to him from the record only." *Bailey v. Galpin*, 40 Minn. 319, 324, 41 N.W. 1054, 1056 (1889). To charge a person with implied or inquiry notice, "the information [provided] must be sufficient to enable [a person] to conduct that inquiry to a successful termination; for otherwise, the general rule that a title shall not be impeached by uncertainties, will intervene for his protection." *Simmons v. Fuller*, 17 Minn. 485, 491–92, 17 Gil. 462, 468 (1871) (quotation omitted).

CSDZ asserts that, after filing its judgment lien, it obtained from a title company an owner-and-encumbrance report, which failed to disclose the existence of a remaining mortgage in favor of respondent. Under these circumstances, a genuine issue of material fact exists as to whether co-appellant had knowledge of facts which, after further inquiry, would have resulted in notice that the release was not intended to release the entire property from respondent's mortgage. *Cf. Howard*, 382 N.W.2d at 296–97 (affirming summary judgment and concluding that notice of lis pendens, which mistakenly recited that only one portion of a farm was subject to litigation, placed judgment creditor on inquiry notice because it would be illogical to file notice as to only one area of the farm). Therefore, we reverse and remand for further proceedings on this issue. We note, however, that once the priorities of the parties' respective liens have been established, the

district court is not precluded from taking appropriate action to correct the Torrens certificate of title pursuant to Minn. Stat. § 508.71 (2010) or to correct the abstract record to reflect the inclusion of Exhibit A in the release.

III

Appellants also argue that the district court erred by failing to address their defense of laches or claims for negligence. "Laches is an equitable doctrine which applies to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165, 175 (Minn. App. 2011) (quotations omitted), *review denied* (Minn. Aug. 24, 2011). Appellants have failed to allege the existence of material facts tending to show that respondent was aware of the defect in recording the release, or that, even if respondent had such awareness, it prejudiced appellants' claims of priority. As to negligence, because appellants have failed to plead the existence of a duty on the part of respondent, a breach of such a duty, or damages, they have failed to state a legally sufficient claim for negligence against respondent. The consideration of other claims against additional entities remains subject to the rules of civil procedure and may be addressed on remand at the discretion of the district court.

Reversed and remanded.