

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1654**

In the Matter of the Petition of Option One Mortgage Corporation,
Regarding Certificate of Title No. 1110609 or the Current Certificate

**Filed September 2, 2008
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-CV-TO-32050

Kevin J. Dunlevy, Michael E. Kreun, Beisel & Dunlevy, P.A., 282 U.S. Trust Building,
730 Second Avenue South, Minneapolis, MN 55402 (for respondent Option One
Mortgage Corporation)

Douglas J. Dehn, Barna, Guzy & Steffen, Ltd., 400 Northtown Financial Plaza, 200 Coon
Rapids Boulevard, Minneapolis, MN 55433 (for appellant Timeline, LLC)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

On appeal after remand, appellant challenges the district court's decision that
ambiguity in a townhouse association's declaration of covenants was to be construed
against appellant and that, as a result, appellant had no interest in the townhouse.

Because we conclude that the district court's ruling was consistent with our remand instructions, we affirm.

FACTS

This appeal is taken from a district court decision after remand from this court. The relevant facts are set forth in our earlier opinion, *In re Option One Mortgage Corp.*, No. A06-764, 2007 WL 823872 (Minn. App. Mar. 20, 2007), *review denied* (Minn. May 30, 2007), and are not restated here.

In the first appeal, respondent (then-appellant) Option One Mortgage Corporation (Option One) challenged the district court's adoption and confirmation of the examiner of titles' conclusion that a townhouse-association-assessment lien foreclosed by advertisement took priority over a subsequently recorded purchase-money mortgage. Because the subject townhouse declaration is ambiguous as to whether the townhouse association was limited to foreclosure by action, and because the ambiguity must be resolved against the drafter, we reversed and remanded. Upon remand the district court concluded that the subject townhouse declaration required the townhouse association to foreclose its assessment lien judicially, i.e. by action; that the association's foreclosure by advertisement was invalid and the resulting sheriff's certificate of sale void; that anyone, including appellant Timeline, LLC (Timeline), claiming an interest through the foreclosure or sheriff's certificate has no right, title, or interest in the real property; and that all right, title, and interest in the real property is vested with Option One. This appeal follows.

DECISION

A district court lacks authority to modify or amend the mandate of an appellate court. *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). A district court's duty on remand is to execute the mandate of the remanding court strictly according to its terms. *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988).

The language of the district court's decision indicates that the district court followed our instructions on remand. Timeline objects to the following language in the district court's memorandum of law that accompanied its order: "The Court of Appeals decision mandates the above Order," and that "in accordance with the Court of Appeals opinion, title to the property is vested with Option One." Appellant argues that this court did not mandate a specific outcome on remand to the district court but, rather, remanded for further proceedings. But before issuing its decision on remand, the district court did consider Timeline's argument, as evidenced by the district court's last statement in its memorandum of law that "Timeline's argument relying on Article [XII] of the Declaration is not persuasive." The district court issued its decision on remand after considering and rejecting Timeline's argument that Section 2 of Article XII of the declaration renders the declaration unambiguous, allowing for foreclosure by advertisement.

Timeline argues that the district court erred in not considering extrinsic evidence in resolving the ambiguity in the declaration on remand. Where a contract is ambiguous, a district court may consider extrinsic evidence to resolve contract ambiguities. *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App.

1991), *review denied* (Minn. Apr. 18, 1991). A district court has “broad discretion” over evidentiary matters, and its decision should be upheld absent an abuse of that discretion or an error of law. *Bergh and Misson Farms, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997). Where appropriate, we have remanded cases to district courts with express instructions to consider extrinsic evidence in determining the intent of the parties to a contract. *See, e.g., Harry N. Ray, Ltd. v. Nascene*, 379 N.W.2d 249, 252 (Minn. App. 1986) (remanding to the district court to “consider extrinsic evidence and determine the intent of the parties”).

But in this matter, we did not remand with instructions to consider extrinsic evidence; we remanded merely for further proceedings consistent with our holding that Section 8(b) in Article IV was “contradictory and ambiguous,” and that the ambiguity was chargeable to Timeline. *In re Option One Mortgage Corp.*, No. A06-764, 2007 WL 823872, at *3 (Minn. App. Mar. 20, 2007), *review denied* (Minn. May 30, 2007). We observe here that the contract at issue is a restrictive covenant recorded in 1980 and covering multiple properties in a townhouse association and that the purchaser was required to agree to the covenant in order to purchase the property. “Where one of the parties draws a contract and the other must accept or reject but cannot vary the terms, the burden is upon the party drawing the contract to make the meaning plain . . . [and] the ambiguities and doubts must be resolved against the party who prepared the contract.” *Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 115, 153 N.W.2d 281, 289 (1967) (quotation omitted). We conclude that the district court did not abuse its discretion in

refusing to consider extrinsic evidence in this case and in resolving the declaration's ambiguity against Timeline.

Timeline argues that Option One should be equitably estopped from challenging the foreclosure because of the passage of time between Option One's acquisition of its interest in the property and its pursuit of legal action to enforce its interest and because of other parties' reliance on the record of Town Oaks Association's foreclosure sale. Equitable estoppel is an affirmative defense and is waived if not pleaded specifically in an answer. Minn. R. Civ. P. 8.03; *see also Spinnaker Software Corp. v. Nicholson*, 495 N.W.2d 441, 445 (Minn. App. 1993) ("Equitable estoppel is an affirmative defense which must be raised in the pleadings. . . ."), *review denied* (Minn. Mar. 30, 1993). Similarly, to the extent that Timeline seeks equitable relief based on claims that Option One unreasonably delayed its legal action or that its delay shows an intent to abandon the property, laches and abandonment are affirmative defenses subject to the same pleading requirement. Minn. R. Civ. P. 8.03; *see Loppe v. Steiner*, 699 N.W.2d 342, 347 (Minn. App. 2005) ("[A]bandonment is an avoidance defense similar to waiver and laches, which are enumerated affirmative defenses."). Because Timeline failed to raise these affirmative defenses in its answer, it has waived them.

Timeline also argues that at trial, Option One never raised the issue that the declaration was ambiguous. The record shows, however, that Option One did raise this issue in its motion for summary judgment, and therefore Timeline's argument lacks merit. *See Schoer v. West Bend Mut. Ins. Co.*, 473 N.W.2d 73, 75 (Minn. App. 1991)

(holding that on appeal from final judgment, this court may review issues raised in a summary judgment motion if they involve the merits or affected the judgment).

Affirmed.