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NO. A10-1672

State of Minnesota  
In Court of Appeals

NC Properties, LLC,

*Appellant,*

vs.

Eric Lind and April Lind; Trend Title, LLC;  
Community Bank of Plymouth; ING Bank, F.S.B.,

*Respondents,*

and

Eric Lind and April Lind,

*Third Party Plaintiffs,*

v.

Thomas Buslee and Tradition Capital Bank,

*Third Party Defendants.*

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## I. ISSUES PRESENTED

1. Did the trial court err as a matter of law in concluding that the parties did not intend the mortgage on the Linds' residence was a down payment or security for a down payment such that it survived cancellation of the purchase agreement?

Apposite authority: Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986); Andresen v. Simon, 213 N.W. 563 (Minn. 1927).

2. In the alternative, did the trial court err as a matter of law in not finding ambiguities in the parties' purchase agreement and related loan documents to allow extrinsic evidence which established genuine issues of material fact as to whether the parties intended the mortgage as an initial down payment?

Apposite authority: Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986); Andresen v. Simon, 213 N.W. 563 (Minn. 1927); Turner v. Alpha Phi Sorority House, 276 N.W.2d 63 (Minn. 1979); TNT Properties, Ltd. v. Tri-Star Developers LLC, 677 N.W.2d 94 (Minn. Ct. App. 2004).

3. Did the trial court err as a matter of law in concluding that sophisticated parties could not expressly agree that the mortgage and loan agreement obligations survived cancellation of the purchase agreement?

Apposite authority: National City Bank Lundgren, 435 N.W.2d 588, 591 (Minn. Ct. App. 1989), pet. for rev. denied (Minn. Mar. 29, 1989), First Construction Credit, Inc. v. Simonson Lumber of Waite Park, Inc., 663 N.W.2d 14 (Minn. Ct. App. 2003).

4. Did the trial court err as a matter of law in concluding that the mortgage was invalid and had no priority over ING's mortgage after cancellation of the purchase agreement?

Apposite authority: Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986); Andresen v. Simon, 213 N.W. 563 (Minn. 1927); Turner v. Alpha Phi Sorority House, 276 N.W.2d 63 (Minn. 1979); TNT Properties, Ltd. v. Tri-Star Developers LLC, 677 N.W.2d 94 (Minn. Ct. App. 2004).

## II. STATEMENT OF THE CASE

On December 18, 2007, Respondents Eric and April Lind agreed to purchase the partially built property from Appellant NC Properties, LLC for the total amount put into the property up to that time, \$1,411,000, and to separately enter construction financing documents to take possession of the property and finish construction. The parties agreed that the total for the purchase and construction would be \$2,650,000. (App. P. 23, Buslee ¶ 4) (App. P. 42, Buslee Ex. 5) The Linds were experienced investors in multiple prior real estate deals. (App. P. 24, Buslee ¶ 6) The house at issue was already partially constructed. As a condition to the purchase, NC Properties, as the seller, requested a down payment of \$400,000. (App. P. 27-28, Buslee ¶ 18) The Linds did not have \$400,000 cash but worked out an express agreement with NC Properties as to the \$400,000, namely, at closing, the Linds would provide a down payment of \$35,000 cash and a \$365,000 mortgage on their residence. (Id.) The Linds provided the above \$400,000 down payment to NC Properties at closing on December 18, 2007. (Id.)

As part of the December 18, 2007 closing, the parties then entered into a construction loan agreement and related financial documents including a promissory note. (App. P. 97-122) The purchase agreement and the construction loan agreement stated that the obligations under the loan, including the promissory note and mortgage, would survive cancellation of the purchase agreement. (Id.) In order to sign the purchase agreement, the Linds were required to put cash down and make initial payment secured by the residential mortgage. (Id.) The residential mortgage was recorded immediately after the signing of the purchase agreement. (App. P. 123) The Linds then took possession

of the investment property and took over the completion of the property by dealing with their selected builder and designer. (App. P. 30, Buslee ¶ 25)

In 2008, the Linds defaulted on the purchase agreement and the loan agreement before the house was entirely constructed and abandoned the house in an incomplete state. (App. P. 34, Buslee ¶ 34) To preserve the property and mitigate damages, NC Properties cancelled the purchase agreement and took over the construction to complete the house. (Id.) In August 2009, NC Properties brought action against the Linds for various breaches of the parties' agreements and to foreclose a mortgage on the Linds' personal residence. On February 16, 2010, the Linds brought a motion for summary judgment based on Minn. Stat. Sec. 559.21.

On April 15, 2010, the District Court ruled that Appellant's claims for breach of contract and foreclosure of the mortgage were barred by Minn. Stat. Sec. 559.21 and that the mortgage was no longer valid. (App. P. 132-147) Judgment was entered on April 16, 2010. On June 7, 2010, Respondent ING Bank brought a motion for summary judgment against NC Properties based upon the Court's April 15, 2010, Order. On July 22, 2010, the District Court incorporated its April 15, 2010, Order to subsequently grant Respondent ING Bank's motion to dismiss NC Properties' claims for priority and that the mortgage was invalid, and granted priority to ING Bank. (App. P. 148-152) Judgment was entered on July 26, 2010 and amended August 31, 2010.

### **III. STATEMENT OF FACTS**

1. *Negotiation for the new construction purchase agreement as an investment for Lind.*

Erik Lind approached Tom Buslee, Chief Manager for NC Properties, and discussed the possibility of Lind and his wife, April Lind, purchasing from NC Properties and completing a partially constructed house located on Lake Minnetonka (the "property") as an investment. (App. P. 22-23, Buslee ¶ 2) Lind inquired about NC Properties' ability to provide him financing. (App. P. 23, Buslee ¶ 3)

Prior to December 18, 2007, Buslee went through the status of where the property was and that there was substantial construction that needed to be done. (App. P. 23, Buslee ¶ 4) Lind asked numerous questions and was made fully aware of the status of the deal and the construction that needed to be done to get this property finished and ready for marketing and sale. (Id.) Lind indicated that he was a realtor and a sophisticated investor in numerous real estate developments and projects and he told Buslee he had the ability to finish the project and market the property for re-sale. (App. P. 25-26, Buslee ¶ 10) Lind stated "I have been a REALTOR since 1994 specializing in new construction sales, marketing, and land development. I have the knowledge and background to successfully complete this project." (Id.) NC Properties required Lind to select a builder and submit financial information to ensure the Linds qualified for the purchase and loan. (App. P. 26, Buslee ¶ 14) Lind then interviewed builders and selected Residential Restoration as his builder. (App. P. 25, Buslee ¶ 8)

Lind presented NC Properties with an offer to purchase on November 27, 2007 ("Proposal"). (App. P. 37, Buslee Ex. 1) Lind indicated he needed a loan amount sufficient to cover the estimated cost of purchase and completion at \$2,303,041. Lind confirmed the amount of \$2,303,041 as determined by the Sworn Construction Statement

and communications with the builder, Residential Restoration. (App. P. 40, Buslee Ex. 2) Lind and Buslee discussed the draw schedules in the construction financing and Buslee made clear to Lind how the draw schedules would work, namely, funds would be disbursed directly to the builder and subs for construction and NC Properties would honor Lind's request to build in interest carrying costs. (App. P. 25, Buslee ¶ 9) Lind requested an "interest reserve" to cover payments for an additional 12 months following completion of construction to market and sell the property. Lind indicated "Perhaps a total loan amount of \$2,500,000" showing he was fully aware of what he was requesting from a borrowing perspective. (App. P. 25, Buslee ¶ 10)

In the final calculations including landscaping and the requested interest reserve, the amount needed was determined to be \$2,650,000 which was agreed to by Lind. The financing at issue was provided by NC Properties for purchase and construction. NC Properties and Lind intended on acquiring the property in a speculative manner to make a profit. (App. P. 29-30, Buslee ¶ 24) Linds' plan was to finish construction, market the property, get a buyer and then have a simultaneous closing with the Linds taking ownership of the completed property and immediately selling to the end buyer. (Id.)

2. *An initial down payment was required to induce NC Properties to sell the property and provide construction financing to the Linds.*

Lind initially prepared and signed a purchase agreement for the Minnetonka investment property on November 27, 2007. This agreement was not signed by NC Properties.

(App. P. 26, 42-54, Buslee ¶ 13, Ex. 5) NC Properties then investigated the Linds' finances and credit history and determined the Linds did qualify for the purchase and construction

financing. (Id.) At the time Lind began negotiations with NC Properties, NC Properties had \$1,411,000 from the total debts that were owed on the property including the associated closing costs of the transaction. (App. P. 27, Buslee ¶ 15)

Lind indicated that he owned two other investment properties that were cash cows and he was going to be subdividing one and selling it and the other property was a lake property which he was going to sell and make a lot of money. (App. P. 26, 55, Buslee ¶ 14, Ex. 6) Buslee and Lind discussed the required down payment. Buslee initially explained NC Properties would require a down payment in line with other lenders around 20% of the loan. (App. P. 27, Buslee 16) Lind indicated to Buslee verbally on several occasions that he had a pending "closing" that would pay Lind in excess of \$100,000 in commission. (Id.) He intended on using the proceeds from his commission on that close along with existing cash in the bank as a portion of his down payment. (Id.) The other portion of the down payment was going to be a mortgage on his primary residence in an amount to be determined based on the cash from the Linds. (App. P. 27, Buslee ¶ 17) The Linds and Buslee agreed the total down payment would be \$400,000 from cash and the mortgage. (Id.)

To verify the mortgage on the Linds' Maple Grove residence would qualify as a down payment, NC Properties needed to determine there was sufficient equity in the home. (App. P. 27, Buslee ¶ 16) NC Properties had an appraisal done on the Linds' residence, with their approval. (Id.) The Linds met with the appraiser and gave the appraiser access to their home to complete the appraisal. (Id.) The value came back at \$930,000 which showed enough equity to utilize the mortgage as a down payment. (Id.,

App. P. 58)

For the parties' closing on December 18, 2007, Mr. Lind was not able to produce the \$100,000 cash down payment from his commission. (App. P. 27, Buslee ¶ 16) Lind indicated he could now only bring \$35,000 cash to closing. The remaining down payment Lind proposed was a mortgage of \$365,000 on his residence. (App. P. 27, Buslee ¶ 17) Without the \$400,000 down payment, NC Properties would not have made the loan. (Id.) NC Properties' requirement of initial secured payment of \$400,000 was in line with other funding options. (App. P. 27-28, Buslee ¶ 18) It was discussed and agreed with the Linds that the full \$400,000 was needed as a down payment to induce the signing of the purchase agreement and give possession of the property to the Linds. (App. P. 28-29, Buslee ¶ 20-22)

This file was unique because it involved the purchase of a partially completed home which already had \$1,411,000 owing along with construction financing to complete the home to get it ready for sale. In any construction scenario, an "up front" down payment is required to induce a builder and lender to provide financing and begin construction, typically in the amount of 20% or more. (App. P. 28, Buslee ¶ 19) The total amount agreed to be given as cash and secured payment was \$400,000, which constituted approximately 15% of the total loaned for the purchase and construction. (App. P. 27-28, Buslee ¶ 18)

Mr. Buslee explained to Lind that NC Properties would file the mortgage immediately upon signing of the documents as further evidence of the intent to treat the mortgage as a down payment. (App. P. 29, Buslee ¶ 22) The Linds also understood that

the construction loan documents further stated that the obligations would survive cancellation of the purchase agreement, knowing they would forfeit all down payments if they did not honor the agreement. (App. P. 29, Buslee ¶ 21)

3. *Cash and mortgage were required at the signing of the purchase agreement.*

After the parties agreed on the amount needed to put down on a sale, the parties entered into a purchase agreement and related loan documents on December 18, 2007. (App. P. 29, Buslee ¶ 21) At signing, the purchase agreement specifically required the Linds to pay \$10,000 cash, \$25,000 origination fee and \$1,411,000 by initial advance of the loan agreement secured by the \$365,000 mortgage. (Id.) The Linds paid the required cash and gave their mortgage, and in exchange, took immediate possession of the property. (App. P. 30, Buslee ¶ 25) NC Properties promptly recorded the mortgage. (App. P. 123-128)

4. *The documents expressly stated that the mortgage and obligations would survive cancellation of the purchase agreement.*

The Linds understood and agreed that the mortgage and obligation for the initial advance under the loan agreement would survive cancellation of the purchase agreement. (App. P. 29, Buslee ¶ 21) Specifically, the purchase agreement stated “[A]ll amounts owed pursuant to the loan agreement would survive any cancellation of the purchase agreement.” (App. P. 97) The loan agreement further stated “Section 10.16. Survival. This Agreement, the Note, and the Mortgage shall survive cancellation of the Purchase Agreement.” (App. P. 117) The other financing documents signed by the Linds on December 18, 2007, including the purchase agreement, mortgage, construction loan

agreement and promissory note all contained expressed survival language. (App. P. 97-128) The Loan Agreement and Purchase Agreement expressly stated that NC Properties at closing would make the initial advance of \$1,411,000 to the Linds for the purchase. (Id.) The Loan Agreement provided for subsequent construction draws for the Linds to build their investment property. (App. P. 103) The mortgage secured the \$1,411,000 initial payment and all the loan agreement and purchase agreement providing that were incorporated by reference fully into the mortgage. (App. P. 123)

5. *The Linds', as sophisticated investors, took possession of the property after signing the purchase agreement and worked extensively on the property but caused delays and drove costs over their budget.*

Once the loan was made on December 18, 2007, Lind took possession of the property and had significant involvement in getting the property completed and directed the application of the construction loan draws. (App. P. 30, Buslee ¶ 25) Lind worked extensively with Bob Charles and Keith Swenson of Residential Restoration, subcontractors and worked with his own designer, Christine Charles of Design Group C. (App. P. 60-77, Id., Ex. 9) Christine Charles and Lind would work together on various selections such as cabinets, flooring and lighting fixtures that were time sensitive. (Id.) The selections made by Lind and Christine Charles often came back well over the budget established by the sworn construction statement. (Id.) However, Lind caused substantial delays and cost increases on the property above the projected sworn construction statement and budget. (App. P. 31, Buslee ¶ 27)

6. *The Linds' actions regarding the ING mortgage.*

Well after Lind began running the construction of the property in December 2007,

NC Properties received a request from Lind to subordinate its mortgage to a new primary refinancing mortgage with ING on the Linds' Maple Grove residence. (App. P. 34-35, 93, Buslee ¶¶ 36-38, Ex. 17) Buslee indicated he would not subordinate but would rather work on a partial release. (Id.) Lind never responded that any refinancing of his personal residence was going forward and was completed. (App. P. 35, Buslee ¶ 38) Buslee later learned that refinancing went forward without NC Properties agreeing to subordinate to the new ING mortgage. (Id.)

7. *The Linds' insolvency and abandonment of the property.*

On or around July 14, 2008, Lind indicated in a meeting with NC Properties that he was insolvent and had no intention of continuing on with the project after the interest reserve expired. He advised NC Properties that he had no intention of making any payments or finishing the property. (App. P. 33, Buslee ¶ 31) It was apparent that Lind was abandoning the project in all regard and NC Properties felt it necessary to take control of the final completion of the home and marketing efforts in an attempt to sell the property, protect its interests and mitigate damages. (Id.)

8. *NC Properties efforts to mitigate its damages.*

After being forced to take back the property due to the abandonment by the Linds, NC Properties did everything to mitigate its damages and try to get the property finished, marketed and sold. (App. P. 34, Buslee ¶ 34) On October 1, 2009, NC Properties sold the Minnetonka property to Todd and Kara Netzke pursuant the Contract for Deed for \$1.9 million. (App. P. 79-86, Buslee Ex. 15) The Netzkes later cancelled the contract and NC Properties is still attempting to sell the property. NC Properties continues to list the

property for sale for \$1.95 million. (App. P. 13, 87, Buslee ¶ 35, Ex. 16) The total cost NC Properties has invested into the property is \$2,787,476.80. (App. P. 14, 78, Buslee ¶ 39, Ex. 11)

In light of the fact that Lind had defaulted on his contract with NC Properties, Linds' further involvement would only interfere or delay in the initiative to market and sell the property and limit damages. (App. P. 33-34, Buslee ¶ 33) NC Properties cancelled the purchase agreement on July 28, 2008 per Minn. Stat. § 559.21. (See App. P. 129-131) NC Properties reserved all rights under the loan agreement and related loan documents. (Id.) The cancellation further stated that the Linds would lose all amounts that they had paid on the contract. (Id.)

9. *The trial court's decisions.*

The trial court determined in its order entered April 21, 2010, that NC Properties cancelled the Purchase Agreement under Minn. Stat. § 559.21. (See App. P. 132-147) The trial court examined whether further remedies would be available to NC Properties based upon whether the Mortgage was a down payment on the Purchase Agreement, or whether the parties could expressly agree that the remedies under the Construction Loan Agreement, Promissory Note and Mortgage survived cancellation of the Purchase Agreement. (Id.) The trial court found in the negative. (Id.) Based upon such findings, the trial court further concluded in its order originally entered July 22, 2010 and amended on August 31, 2010, that the Mortgage was invalid and thus could not have priority over the ING Mortgage. (App. P. 148-152)

#### IV. LEGAL ANALYSIS

##### A. Standard of review.

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented. Mutual Serv. Cas. Ins. Co. v. Wochnick, 397 N.W.2d 435, 437 (Minn. Ct. App. 1986)(quotations omitted). All doubts and factual inferences must be resolved in favor of the non-moving party. Ingram v. Syverson, 674 N.W.2d 233, 235 (Minn. Ct. App. 2004). A reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. Mudrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn. 2003).

Contract interpretation is a question of law which appellate courts review de novo. Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359 (Minn. 2009) (same). In analyzing a contract, Minnesota law construes the contract as a whole, attempting to reconcile all of its clauses. Knut Co. v. Knutson Const. Co., 433 N.W.2d 149, 151 (Minn. Ct. App. 1988) (finding that a contract and several writings relating to the same transaction must be construed with reference to each other, even when the documents do not refer to each other.) Id.

Because fulfilling the intention of the parties is the purpose behind the rules of contract construction, "[t]he primary goal of contract interpretation is to determine and enforce the intent of the parties." North Star Universal, Inc. v. Graphics Unlimited, Inc.,

563 N.W.2d 73, 75 (Minn. Ct. App. 1997) A court ascertains the parties' intent by placing itself in the parties' positions at the time they formed the contract and determining what they reasonably intended to accomplish in view of the contract as a whole, its plain language, and the surrounding circumstances. Ecolab, Inc. v. Gartland, 537 N.W.2d 291, 295 (Minn. Ct. App. 1995).

**B. The trial court erred as a matter of law in concluding that the parties did not intend the mortgage on the Linds' residence was a down payment or security for a down payment such that it would survive cancellation the Purchase Agreement.**

*1. Trial court erred as a matter of law in not finding that the purchase agreement and loan documents establishes that the mortgage on Respondent Linds' residence was given as a down payment to induce the sale of the Lake Minnetonka investment property.*

The parties expressly agreed that the residential mortgage was given as initial payment along with cash for the inducement of the signing of their investment purchase agreement. As evidenced by all of the related documents, the Linds agreed to give the mortgage as part of their initial down payment to induce the sale of the property. Specifically, the purchase agreement provided for initial down payments of a) \$10,000 down payment cash; and b) \$1,411,000 first payment due to seller at first signing of this Contract (by initial advance under the loan agreement). (App. P. 97) The mortgage then highlighted that it secured advances up to \$365,000. (App. P. 123) Since initial advance at closing of \$1,411,000 was greater than the mortgage, the initial advance was accordingly secured at the time of closing by the \$365,000 mortgage, illustrating the parties' intent that the mortgage was a down payment given at closing to induce to sale and construction financing.

The trial court erred when it determined that the mortgage on the Linds' residence was not intended as a down payment or security for down payment and did not survive cancellation of the purchase agreement. To induce the sale of the property and the construction financing, the Linds expressly agreed to provide cash and *initial* payment secured by the residential mortgage at signing. (App. P. 97)

“Down payments” are that part of the purchase price paid by the buyer initially to “induce” sellers into selling property and will survive cancellation under Minn. Stat. § 559.21. See Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986). Moreover, a seller may enforce a note and mortgage given in lieu of initial payment after cancellation of a contract for deed. See Andresen v. Simon, 213 N.W. 563 (Minn. 1927).

In Andresen, the Minnesota Supreme Court held that when a note and mortgage were accepted in lieu of cash payment in a land contract, and the vendor cancelled a contract for purchaser's default, the vendor could enforce the note and mortgage, as consideration which did not fail upon the cancellation of the contract. Id. at 565. In Andresen, the parties drafted a contract for deed but the buyer was unable to come up with the full cash down payment required by the seller. Id. at 564. The buyer provided a note and mortgage but the parties did not modify their contract to reflect that such non-cash pledge would survive cancellation of the contract. The court concluded that the evidence supported a finding that, in lieu of the initial or down payment for which the contract provided, the vendor accepted the note of the vendees, secured by a real estate mortgage. Id. at 565. The court found that the execution and delivery of the contract was

present consideration for the mortgage. Id.

Here, the purchase agreement expresses the parties' intent that the obligations survived cancellation. In Novus and Andresen, the courts were forced to interpret the contract to determine whether the parties intended the payment obligation or security to survive cancellation of the land contract. In this case, however, the parties expressly agreed that the Linds would provide cash and an *initial payment* of \$1,411,000 secured by the residential mortgage and specifically that the mortgage would survive cancellation of the purchase agreement. (App. P. 97)

NC Properties entered into the purchase agreement because the Linds pledged their mortgage in a different property, their Maple Grove residence, as consideration for an initial payment to induce the sale of the investment property. As in Andresen, the Linds were unable to come up with the full cash required by NC Properties for the down payment for the purchase. Instead of cash, the Linds pledged a partial mortgage on their residence to induce the sale. The Linds approved an appraisal to be conducted on their residence to establish immediate equity in their home. The appraisal showed enough equity to allow the mortgage to be used as a down payment. (App. P. 58)

Moreover, the parties determined the amount needed for the total secured initial payment of \$400,000. Lind initially indicated he could come up with \$100,000 down from real estate commissions but eventually could only come up with \$35,000 cash. (App. P. 27) Accordingly, NC Properties agreed to take the remaining down payment of \$365,000 through a mortgage on the Linds' residence which would be filed immediately upon closing. This mortgage was expressly intended to be a down payment to induce the

seller, NC Properties, into entering into this transaction as it secured the \$1,411,000 initial advance due at closing. (App. P. 97-128)

NC Properties would not have entered into this transaction if the parties were interpreting the cash payment of \$35,000 to be the only down payment. (App. P. 27, Buslee ¶ 17) They would not be adequately secured in the property. The mortgage was immediate security of the non-cash payment made at signing and, the parties agreed that the payment obligation would survive the cancellation of the new construction purchase agreement. The Linds expressly agreed by the terms of the documents and were fully aware that they would lose all initial payments of cash and non-cash they made to induce the sale if the new construction agreement was cancelled. (App. P. 97-128) The purchase agreement expressly states that the parties intended that the payment obligations and mortgage survive the cancellation of the purchase agreement, and thus, the trial court's determination was error and must be reversed. (App. P. 97)

While this Court need not give deference to the trial courts determination, it is important to note that the trial court erred in its interpretation of the contracts in finding that the mortgage was "plainly intended" to secure "future construction advances." To the contrary, the trial court overlooked that the full terms of the loan agreement and note were incorporated into the terms of the mortgage. (App. P. 123) The trial court cannot simply ignore terms to determine the parties' intentions. The mortgage included loan agreement terms that expressly provided that the mortgage secured any advances, for any purposes, as approved by NC Properties. The initial advance made at signing of \$1,411,000 was secured at closing by the mortgage and was not a "future construction

advance” but rather it was a down payment. (App. P. 97)

The trial court failed to address that this was not a future advance but such payment and security was needed in order for the purchase agreement to be signed. The documents would not have been signed without such security being provided and it certainly was not for future construction advances. Moreover, the parties expressly agreed the obligation would survive the cancellation of the purchase agreement which gives even stronger evidence that the parties meant for the mortgage to be used as security and that the Linds understood they would lose this security if the agreement was cancelled. The trial court ignored terms and erred as a matter of law in not finding that the mortgage was a down payment that survived cancellation of the purchase agreement.

2. *In the alternative, the trial court erred as a matter of law in not finding ambiguities in the parties to allow extrinsic evidence which clearly highlights a genuine issue of material fact as to whether the parties intended the mortgage as an initial down payment.*

The construction and effect of a contract is a question of law unless the contract is ambiguous. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003) (citing Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979)). A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation. Id. Although the determination of whether a contract is ambiguous is a question of law, the interpretation of an ambiguous contract is a question of fact for the jury. Id.

If the trial court did not hold that the initial advance of \$1,411,000 was immediately secured by a down payment as evidenced by the mortgage to induce the

sale, the court should have found ambiguities in the parties' agreement. The trial court erred in failing to find any ambiguities and not allowing extrinsic evidence which further clearly highlighted that the parties intended the mortgage to be part of the down payment to induce the sale of the property. Even though the trial court stated that a down payment "must be part of the purchase price paid by the buyer initially to induce to induce the seller to enter the contract" (App. P. 143), the court failed to review the express language of the purchase agreement that the *initial* payment of cash and secured advance was due upon *signing* of the new construction purchase agreement. If the court did not find that the parties' expression clear that the initial payment was to induce the sale was secured by the mortgage and that the parties expressly intended the mortgage to survive cancellation of the purchase agreement, then the court should have found at a minimum, factual issues remained as to the parties' intention that would preclude summary judgment.

The court's findings about the cash down payment highlight a key ambiguity. Mr. Lind and Mr. Buslee never discussed a down payment of only \$10,000 cash as found by the court but rather Mr. Buslee and Mr. Lind always discussed the cash down payment of \$35,000 along with the mortgage. (App. P. 27, 43, 134) However, as an ambiguity in the purchase agreement, it only shows an initial cash down payment of \$10,000 and allocates the remaining \$25,000 to a broker fee. (App. P. 97) Again, this is not supported by any discussions by Mr. Lind and Mr. Buslee. This ambiguity as to the \$35,000 cash payment illustrates a need for parole evidence to determine the parties' intent as to the down payment. (For parole evidence presented to the court, see discussion in Statement of

Facts III, Section 2.)

In Novus, the court determined that the issue of whether the parties intended for a note to survive cancellation was a question of fact, inappropriate for summary judgment. Novus at 430. The Novus court specifically questioned whether the parties *intended* that a payment obligation would survive cancellation of a contract for deed. The Novus court explained the factual nature of the issue in that a “down payment” consists of the amounts paid by the buyer to “induce the seller to enter into the contract.” Id. at 429. The contract for deed at issue in Novus did not contain “survival language” which indicated whether the parties intended for payment or obligations to survive cancellation of the contract for deed. Id. at 429. Because the contract contained no express survival provision, Novus stated its analysis “was a short hand way of asking whether the parties intended the deferred payments in the note to survive cancellation of the contract for deed.” Id. Thus, the court determined that summary judgment was not appropriate because factual issues remained as to whether the parties intended the obligation to survive cancellation.

Here, the trial court ignored the language of the agreements and evidence submitted and determined that the parties did not intend the mortgage to induce the sale and did not intend the mortgage to survive the cancellation of the purchase agreement. To the contrary, the contract documents repeatedly and expressly stated that the initial payment was due at the signing of the purchase agreement and that the mortgage would survive cancellation.

The fact that the Linds agreed that the mortgage survived cancellation illustrates

the parties' intent that the mortgage was a down payment given as security for the payment to *initially* induce sale of the investment property. The court failed to address the language of the new construction purchase agreement which stated that cash and initial advance (secured by the residential mortgage) was required at the signing of the purchase agreement. The trial court failed to address that the mortgage secured the initial payment made to induce the sale, and further that the survival language was made throughout the documents. (App. P. 132)

The mortgage given by the Linds induced the sale – the purchase agreement would not have been signed if it had not been provided by the Linds at the signing of the purchase agreement. The parole evidence submitted to the court clearly established genuine issues of material fact regarding the parties' intent as to the down payment. (See discussion in III of the Statement of Facts § 2.) As a result, the trial court erred in failing to find ambiguities and allowing extrinsic evidence regarding whether the mortgage was given to induce the sale and whether it was intended to survive cancellation of the purchase agreement.

**C. The trial court erred in determining that the parties could not expressly agree that the mortgage and loan agreement obligations survived cancellation of the purchase agreement.**

The trial court erred when it determined that the cancellation of the purchase agreement also cancelled the separate construction loan agreement. While the Linds contend that NC Properties lost its right to pursue enforcement of the purchase agreement after it was cancelled, it does not follow that the statutory cancellation also cancelled the loan agreement obligations which the parties' expressly agreed would survive such

cancellation. Minnesota law allows buyers and sellers to agree on terms that survive until such terms are fulfilled by the obligated party. In First Construction Credit, Inc. v. Simonson Lumber of Waite Park, Inc., 663 N.W.2d 14 (Minn. Ct. App. 2003), the purchase agreement included a non-merger clause that provided for the survival of the contract obligations beyond the closing and the conveyance of title. In such case, the purchase agreement specifically stated that “[A]ll covenants and agreements herein made, including the terms of this Purchase Agreement itself, shall not merge, but shall survive the closing hereunder and shall constitute conditions and obligations of the parties hereafter.” Id. at 21. The court determined that because the obligation at issue was one of the obligations provided in the purchase agreement, the parties' intent was clear “that it will continue to be a contractual duty until it is satisfied, despite the closing of the sale.” Id.

Moreover, parties may contractually agree that payment obligations remain after cancellation of contracts. In National City Bank Lundgren, 435 N.W.2d 588, 591 (Minn. Ct. App. 1989), pet. for rev. denied (Minn. Mar. 29, 1989). In National City Bank Lundgren, the court determined that the parties could contractually agree that guaranty obligations would survive cancellation of a mortgage. The court made the following examination:

The guaranty contract in this case does indeed reserve to the bank a recourse against Lundgren by providing that the Lundgren's liability is "absolute and unconditional" irrespective of any "lack of validity or enforceability of the [principal debt]" or "other circumstance which might otherwise constitute a defense available to, or discharge of, the Borrower."

Id. at 592. (See also unpublished cases cited per Minn. Stat. Section 480A.08 Subd. 3:

Begin Development Co. v. KMW Management, 1990 WL 72151 (Minn. Ct. App. 1990) (holding that the parties could expressly agree that obligations remained after cancellation of a land contract and that defaulting party was required to pay the expenses of cancellation of a contract for deed and that the trial court properly enforced the promissory note) (App. P. 153-155); See also Fredrick v. Pogin, 1991 WL 46565 (Minn. Ct. App. 1991) (holding that parties could expressly agree that obligations on a separate guaranty agreement would remain after cancellation of a contract for deed) (App. P. 156-158). Similarly in this case, the parties expressly agreed that such obligations on the loan agreement, promissory note, mortgage and purchase agreement would survive cancellation of the purchase agreement. (App. P. 97-128) For example, the parties specifically agreed that NC Properties could enforce the loan agreement obligations and remedies and seek damages related to the construction draws rather than the Linds' purchase agreement related to the purchase of the original property structure. (App. P. 117)

Cancellation of the new construction purchase agreement does not relieve the Linds from other obligations and responsibilities under separate agreements with NC Properties. The trial court clearly erred in its finding that NC Properties did not advance any funds to the Linds because NC Properties set forth evidence that funds as required to induce the sale and were advanced as directed by Eric Lind, including that Lind borrowed money to pay for design services and other services of his choosing. (App. P. 76) Lind also conceded that he reviewed draw requests. (Id.) Lind mismanaged his construction and escalated the costs for which he must be responsible.

The obligations to repay NC Properties on the construction loan draws advanced clearly are a separate obligation after closing that should survive cancellation of the purchase agreement. Defendants used loan draws to build and inflate costs on the Property, and such draws are owed to Plaintiff under the terms and conditions of the construction loan agreement. The Linds specifically agreed to the terms of the construction loan agreement which expressly stated that conditions were to survive cancellation related to their investment purchase. (App. P. 117) Notwithstanding, genuine issues of material fact remain on the amounts borrowed by the Linds and the liability to NC Properties for driving up costs and improper use of the loan proceeds. Consequently, the trial court erred in determining that NC Properties claims for breach of the construction loan agreement because funds were advanced to the Linds and the parties expressly agreed that the Linds would be responsible for the loan obligations even if the purchase agreement to buy the property was cancelled.

Finally, the trial court incorrectly determined that NC Properties was seeking a double recovery because it elected its remedies by cancelling the contract. (App. P. 145-146) The court itself noted the practical effect of the cancellation was quite beneficial to the Linds. The court found the Linds lost what was turning out to be a poor investment. The court highlighted the property had cost over \$2,700,000 and was not able to be sold for a substantial loss and had been on the market for a lengthy period of time. The court found that the loss to NC Properties when all is said and done could be close to \$1,000,000. (App. P. 142) Because the parties agreed that the mortgage survived cancellation, such determination is in error. NC Properties is only seeking to be made

whole. Even if the trial court found that the mortgage was not intended as security for an initial payment made to induce the sale, the trial court cites no law that NC Properties could not further enforce actions based upon Linds' mismanagement of the property under the new construction loan documents. Consequently, the trial court erred when it determined that the loan agreement did not survive cancellation of the purchase agreement.

**D. The trial court erred as a matter of law when it determined that the NC Properties mortgage was invalid and thus did not have priority over the ING mortgage.**

Based upon the trial court's order entered on April 21, 2010, the trial court further incorporated its findings to order as a matter of law that since its determined the NC Properties mortgage was invalid, it could not maintain priority over the ING mortgage. (App. PP. 148-149, 150-151) For the same arguments as asserted above, the trial court erred in its determination that the NC Properties mortgage did not survive cancellation of the purchase agreement. Consequently, the NC Properties mortgage should survive and maintain priority in the order such mortgages were recorded on the Linds residential property.

## V. CONCLUSION

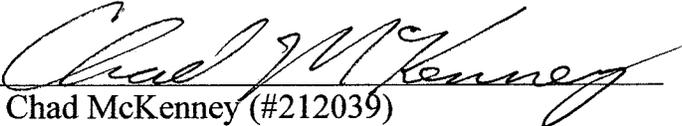
The record before the trial court established that the parties expressed their intentions in their agreement that the mortgage was given as security for the initial down payment made to induce the sale of the property, and thus, survives cancellation of the purchase agreement. In the alternative, the parties' agreement contains ambiguities that must allow extrinsic evidence to be introduced and allow a finder of fact to determine the

parties' intentions. As such the mortgage cannot be declared invalid and must keep its priority over the ING mortgage, or cannot be decided until ambiguities are determined by the trier of fact. Finally, the court further erred in determining that the sophisticated parties cannot contract to allow the survival of obligations in separate contracts upon the cancellation of the purchase agreement.

For the reasons set forth above, NC Properties, LLC respectfully requests that this court reverse the conclusions of the Hennepin County District court, in all respects.

Dated this 22<sup>nd</sup> day of November, 2010.

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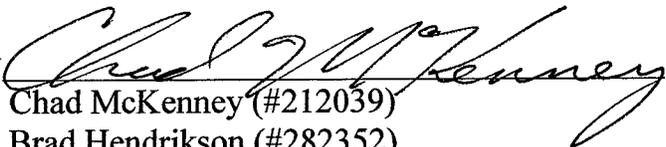
**CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subdiv. 3(a). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. font, which reports that the brief contains 7,816 words.

Dated this 22<sup>nd</sup> of November, 2010.

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