
NO. A08-458

State of Minnesota
In Court of Appeals

Crablex, Inc., a Minnesota corporation,

Appellant,

vs.

Minneapolis Community Development Agency,
 Riverside Plaza Limited Partnership, Capmark Finance, Inc.,
 The City of Minneapolis, Cedar Cultural Center, Inc., and
 Associated Bank, National Association,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT AND AUTHORITY

In their brief, Riverside Plaza Limited Partnership (“Riverside”), Minneapolis Community Development Agency (“MCDA”) and Capmark Finance, Inc. (together with Riverside and MCDA, the “Riverside Respondents”) address several issues, including *res judicata*. Although *res judicata* is the decisive issue that makes all other issues moot, the Riverside Respondents have buried that discussion in the middle of their brief. Because *res judicata* deserves top billing, as a matter of both importance and logic, we will discuss it first, and then respond to other issues. We will then respond separately to issues raised by the City of Minneapolis (the “City”) and Cedar Cultural Center.

I. CRABLEX IS ENTITLED TO JUDGMENT AGAINST RIVERSIDE AND MCDA.

A. RES JUDICATA BARS MCDA’S AND RIVERSIDE’S CLAIMS AND DEFENSES.

In this appeal the Riverside Respondents argue for the first time that the doctrine of *res judicata* does not apply because the Foreclosure Action and these Proceedings Subsequent do not involve the same claim for relief, and because they did not have a “full and fair opportunity” to present their claims in the Foreclosure Action.

Crablex’s claims for relief in these Proceedings Subsequent and the Foreclosure Action are identical. In its Foreclosure Action Complaint, Crablex specifically sought a decree that the purchaser from an unredeemed foreclosure sale shall take title free of all encumbrances other than “prior encumbrances of record.” (AA 337). In these Proceedings Subsequent, Crablex seeks a determination that the Torrens title it obtained

through foreclosure of the Mortgage is free of all encumbrances other than prior encumbrances of record.

Crablex not only sought a determination of priority in its Foreclosure Complaint; but contrary to what the Riverside Respondents claim on page 13 of their brief, Crablex vigorously and repeatedly asserted in the Foreclosure Action that the Mortgage had priority over all Riverside Respondents' later-recorded encumbrances. In response to the Riverside Respondents' objections to the initial order for judgment in the Foreclosure Action, Crablex's attorneys laid out their position in a letter that plainly said, "*easements . . . not of record prior to the mortgage will not survive the foreclosure.*" Later, Crablex's attorneys, in writing, specifically rejected a request from the Riverside Respondents' attorney to insert language in the Foreclosure Judgment stating that "*no determination has been made regarding the relative priority of [the First Trust Mortgage] and any outstanding interests of [the Riverside Respondents] in the Foreclosure Premises.*" To resolve their motion to vacate the foreclosure judgment order Crablex then insisted upon, and the Riverside Respondents agreed to, entry of a Foreclosure Judgment and Decree that included language making the purchaser at an unredeemed foreclosure sale "*the absolute owner of the Foreclosure Premises, subject only to prior encumbrances of record, if any.*" (For a fuller summary of these proceedings, with references to support in the Appellant's Appendix, see pages 11 through 13 of Appellant's Brief).

The Riverside Respondents' claim that they did not have a "full and fair opportunity" to present their claims in the Foreclosure Action is nothing less than

startling in view of the facts that: the action was pending for 10 years; the Riverside Respondents allowed more than five years to elapse without ever asserting that the claimed settlement agreement affected the foreclosure action; and, as shown above, the Riverside Respondents repeatedly raised and argued priority issues before entry of the final Foreclosure Judgment and Decree. The Riverside Respondents simply ignore these undisputed facts, and attempt to manufacture an argument by misrepresenting Crablex's position and actions in the Foreclosure Proceedings.

On page 14 of their brief the Riverside Respondents assert that "*the only easements challenged by Crablex in the [Foreclosure Action] were the three Terminated Driveway Easements,*" and that "*Crablex never argued [in the Foreclosure Action] that the Riverside Plaza easements...would not survive foreclosure.*" As shown above, this is simply untrue.

The Riverside Respondents also completely mischaracterize Crablex's Foreclosure Action Complaint, arguing that it had nothing to do with the Riverside Easements, which are largely designed for uses other than access or parking, because the Complaint's prayer for relief asks that the Riverside Respondents be barred from "*any right, title or interest in the Encroached Premises for driveway, access and parking purposes.*" It is true that the Foreclosure Complaint seeks foreclosure of the First Trust Mortgage, and then alleges in paragraph 11 that certain driveway, access and parking easements in a defined "Encroached Premises" have been terminated by contract. The prayer for relief quoted by the Riverside Respondents relates to those contractually terminated easements; with respect to foreclosure, however, its paragraph b specifically requests a decree that

the purchaser from an unredeemed foreclosure sale “*be decreed to be the absolute owner of the Foreclosure Premises ..., subject only to prior encumbrances of record, if any.*” (AA 335-336, 337-338).

The Riverside Respondents likewise mischaracterize Judge Oleisky’s February 15, 2001, Order in the trespass portion of the Trespass/Foreclosure Action. They point to language in the Order stating that “*the other claims raised in Crablex’s Complaint and [Riverside’s] counterclaim were settled pursuant to a Settlement Agreement dated February 17, 2000,*” and they imply that this language refers to the priority claims in foreclosure. This implication is preposterous. Judge Oleisky was considering and referring to trespass damages claims only. He was never presented with a copy of the claimed settlement agreement or informed of any of its provisions that allegedly dealt with priority. Five years later, when the Foreclosure Action came on for hearing, he issued an order determining that the Mortgage had priority over all encumbrances other than “*prior encumbrances of record.*” The Riverside Respondents agreed to that Order without ever mentioning the existence of a supposed settlement agreement.

The Riverside Respondents conclude the *res judicata* portion of their brief by misstating the holding in *Smith v. Smith*, 51 N.W. 2d 276 (Minn. 1952). That case, they say, holds that “*a final judgment can never bar an action to enforce a partial settlement reached prior to judgment.*” *Smith* actually holds that, “*where a particular matter is withdrawn from consideration of the court...by stipulation of the parties...a judgment entered on other issues will not act as a bar on the issues so withdrawn.*” 51 N.W. 2d at 279-280. As fully discussed on pages 21 and 22 of Appellant’s Brief, the judgment in the

Foreclosure Action did not determine issues “other than” the priority issue; but, on the contrary, squarely decided the issue of priority in language to which the Riverside Respondents agreed. They have litigated their priority claims, and lost.

Following their discussion of Crablex’s *res judicata* defense, the Riverside Respondents take the position that they are entitled to affirmatively assert the defense of *res judicata* as a bar to Crablex’s claims. Not only is this position an affirmative defense that was neither pled nor advanced in the trial court; it is a mere rehash of the claim that Crablex did not raise the issue of priority in the trial court.

B. THE ALLEGED SETTLEMENT AGREEMENT IS NOT VALID.

In arguing that the claimed settlement agreement is binding even though it was not signed by Daniel Rosen, who then represented the fee owner of the Mortgaged Premises, Cedar Riverside Land Company (“CRLC”), the Riverside Respondents ask the Court to side-step the question of what the parties intended. The claimed settlement agreement was drafted by Riverside, and it was set up for signature by the attorneys for all of the parties. In fact, it was set up for attorney signature as signatory for a party, for each party’s signature block consists of a signature line for a principal of the party followed by a signature line for the attorney, strongly suggesting that the party had not executed the agreement until the attorney signed. (AA 694-695). This conclusion is consistent with the nature of the matter, since an attorney’s signature is logical and prudent in settlement of litigation, and is confirmed by David Olsen’s statement in open court, on the record, that the proposed agreement would not be final until Rosen signed it. (AA 929).

The Riverside Respondents cite *Naylor v. Stene*, 104 N.W. 685, 686 (Minn. 1905), for the rule that “*a party who signs and delivers an instrument is bound by the obligation he assumes, although it is not executed by all the parties for whose signature it was prepared.*” But this rule certainly does not apply if the parties intended otherwise, as the *American Federation* case, discussed below, confirms. In the trespass litigation it was certainly not intended that the parties would be bound piecemeal, because the Riverside Respondents concede that CRLC, the fee owner, was a material party to any settlement: the obligation to convey the easement parcels pursuant to the claimed settlement agreement was an obligation of CRLC. Crablex was not the owner of the Mortgaged Premises when the claimed settlement agreement was partially signed, and it would not become owner for nearly six years. Therefore, even by the *Naylor* standard, the party not bound by the agreement was the only party having an obligation to convey the easement areas, which was an immediate obligation under the terms of the agreement.

The Riverside Respondents assert that *Am. Fed. of State Cty. and Mun. Employees, Council No. 14 of St. Paul*, 533 N.W. 2d 623, 627 (Minn. Ct. App. 1995), which holds that no contract is formed “*where the parties’ actions indicate an expectation that something remains to be done to establish contractual relations,*” does not apply. That case, they say, involved a contract that by its terms did not become effective until third parties ratified it, while the claimed settlement agreement has no such provision. But the alleged settlement agreement has a signature line for third-party Rosen, and that empty signature line speaks louder than words.

Appellant's Brief cites to *Asbestos Prods., Inc. v. Healy Mech. Contractors, Inc.*, 306 Minn. 74, 78, 235 N.W. 2d 807 (1975), for the proposition that, if the parties make execution of a contract a condition to its completion, there is no contract until it is executed. (App. Br. 27). The Riverside Respondents claim this proposition does not apply here because of the statement in *Asbestos Products* that an unexecuted contract is binding if the parties have agreed to its terms and performed in reliance on it. Here, however, there was no agreement, as Rosen's strenuous objections show, and no performance in reliance. The only "performance" was payment of purchase price, but that has been deposited, and remains, in escrow. It remains undisputed that the Riverside Respondents have not performed their obligations to indemnify Crablex or pay real estate taxes, did not rely upon (or even mention) the claimed settlement agreement during the course of the Foreclosure Action, and have not changed their position in reliance on the claimed settlement agreement.

The Riverside Respondents contend on page 9 of their brief that the parties' conduct confirms the claimed settlement agreement's validity. Quite the contrary. The evidence cited for confirmation is flimsy at best. Rosen's request for an amendment to the agreement, they claim, proves that the agreement had been finalized. This intentionally misrepresents Rosen's position; he said he would not sign the agreement unless an amendment was also signed. (AA 936). Neither the originally proposed or amended agreements, however, were ever executed by Rosen.

It is true that Crablex's counsel objected to evidence offered in the Trespass Action on the grounds that it concerned matters discussed in settlement negotiations, as

was his right under Minnesota Rules of Evidence 408: however, the objections were made the day after the agreement was partially signed, when it was not then known that Rosen would object and refuse to sign. (See Respondents' Joint Appendix at 078, referring to "*the agreement that we signed yesterday*"). Objections made during the course of the Trespass Damages trial, therefore, do not prove the existence of a settlement agreement that was subsequently rejected by CRLC attorney Rosen and never performed by any party.

In sharp contrast, the conduct confirming that there was no settlement agreement is compelling. In the five years between the claimed settlement agreement and judgment in the Foreclosure Action, the Riverside Respondents never once claimed that there was a settlement agreement that affected the Foreclosure Action, determined issues of priority or created an obligation to convey real property. Riverside did not produce a proposed deed to the easement areas it claims should have been conveyed by CRLC until 27 months after the claimed settlement agreement was partially signed, dawdled with the Examiner of Titles for another 16 months while keeping both Crablex and CRLC in the dark, and then dropped the matter entirely when the Examiner of Titles made a final decision that a Registered Land Survey was required before any deed could be recorded. These actions and inactions are the conduct of a party with a half-hearted interest in pursuing a conveyance to which it is not contractually bound.

In sum, the Riverside Respondents' attorneys who drafted the claimed settlement agreement and submitted it for partial execution had every opportunity to claim in the Foreclosure Action that there was a binding settlement agreement but did not do so, and

did not seriously pursue a conveyance that, according to the terms of the claimed settlement agreement, was to close in or about February 2000. Rather, the settlement agreement claims were made for the first time in these Proceedings Subsequent, and then only after the Riverside Respondents hired a new set of lawyers who had no first-hand knowledge of the Foreclosure or Trespass Actions. The alleged settlement agreement is neither a settlement nor a contract -- it is a litigation strategy devised by new counsel.

C. THE ALLEGED SETTLEMENT AGREEMENT CANNOT BE SPECIFICALLY ENFORCED.

The Riverside Respondents claim Crablex cannot argue that the lack of a legal description in the alleged settlement agreement makes a decree of specific performance inappropriate, because appellate courts “*decline to address matters raised for the first time on appeal.*” This position fails to distinguish between a claim, and an argument in support of or opposition to that claim, as the very cases cited by the Riverside Respondents make clear. *See Thiele v. Stich*, 425 N.W. 2d 580 (Minn. 1998) (statute of limitations claim not based upon facts in the record); *In re Risk Level Determination of JV*, 741 N.W. 2d 612 (Minn. App. 2007) (party on appeal asserted harm not asserted in trial court); *Lee v. Fresenius Med. Care Inc.*, 741 N.W. 2d 117 (Minn. 2007) (party raised wrongful termination claim for the first time on appeal). Crablex opposed a decree of specific performance in the trial court, and its arguments on appeal support that position -- all of which arguments are based on the record that was before the trial court. Moreover, Crablex’s arguments assert that the trial court abused its discretion in issuing

the decree of specific performance, and in its nature the abuse occurs only upon the issuance of the order.

The rule proposed by the Riverside Respondents, rejecting all arguments not made in the trial court, is absurd, since it would reduce the appellate role to a mere rerun of the trial court proceedings. Nor do the Riverside Respondents even follow their own proposed rule; nearly all of the *res judicata* arguments in their brief make their debut on this appeal.

Addressing the merits, the Riverside Respondents claim that cases refusing to specifically enforce a contract subject to conditions do not apply in this case, because the alleged settlement agreement's lack of a legal description does not create conditions to its enforcement. In making that argument, they conveniently ignore the cases cited on page 30 of the Appellant's Brief which hold that a court cannot specifically enforce a purchase agreement that does not describe the land to be conveyed.

Moreover, the lack of a legal description in the alleged settlement agreement creates "conditions," even under the Riverside Respondents' own preferred definition of that term. They define a condition as, among other things, "*an uncertain act or event that triggers . . . a duty to render a promised performance.*" There are several such uncertainties, in that, before any conveyance under the claimed settlement agreement can be made, several triggering acts have to occur: (i) the parties must agree to the legal description, or a court must determine it, assuming that it has the evidence and authority to do so; (ii) a Registered Land Survey must be prepared as a condition to recording; and (iii) the Registered Land Survey must be approved in accordance with law. As to the first

triggering act, the description cannot as claimed be determined from the sketches attached to the claimed settlement agreement. Those sketches contain neither calls nor dimensions, no scale is shown, and, contrary to what the Riverside Respondents assert, the sketches do not by the terms of the agreement follow any pre-existing easement descriptions. As the record clearly shows, when Riverside finally prepared a proposed description, Crablex objected to it.

On page 32 of its brief, Crablex argues that specific performance is unavailable because of the holding in *Boulevard Plaza Corporation v. Campbell*, 94 N.W. 2d 273, 282-283 (1970), denying specific performance to a party who fails to act under a contract for so long that he gives the impression that he has abandoned the contract and intended to perform it only if it suited his purpose. On pages 11 and 12 of their brief, the Riverside Respondents point to some minor differences between *Boulevard Plaza* and this case, but they point to nothing that makes its core holding inapplicable.

D. THE MORTGAGE WAS NOT MADE “SUBJECT TO” THE RIVERSIDE EASEMENTS.

The only relevant easement agreement existing in favor of the Riverside Respondents’ property when the Mortgage was given was the Easement Agreement, which was then recorded on Abstract but not Torrens title. Two of the Riverside Easements, the McKnight Driveway Easement and Gas Line Easement, were created by instruments executed after the Mortgage was made and recorded, not by the Easement Agreement; a third easement, the E Building Parking and Utility Easement, was established in its current location by a post-mortgage document.

In the discussion on pages 17 and 18 of their brief, the Riverside Respondents, after limiting their “subject to” argument to the easements created by the Easement Agreement, misread the cases identifying off-Torrens title encumbrances to which Torrens title is subject. They claim that a party acquiring an interest in or encumbrance on Torrens title is subject to all existing encumbrances contained in documents known to the acquiring party, but this is not the test. The acquiring party must have actual knowledge that the existing encumbrances affect his Torrens title, as dramatically shown by *Kane v. State*, 237 Minn. 261, 55 N.W. 2d 333 (1952), and *Petition of Willmus*, 568 N.W. 2d 722 (Minn. App. 1997). Those cases hold that a purchaser of registered land does not take subject to easements or restrictions that are contained in documents registered on the Torrens title but not separately memorialized on that title.

The knowledge argument of the Riverside Respondents here is much weaker than the argument advanced by the holders of the easements and restrictions in *Kane* and *Willmus*, because there the documents referencing encumbrances were registered on the Torrens title, while here they were only recorded against the abstract title. The First Trust Mortgage covered both abstract and Torrens title, and there is no evidence that First Trust knew that the Easement Agreement (recorded in abstract) affected Torrens title when it took its mortgage, as required by *In re Juran*, 178 Minn. 55, 60, 226 N.W. 201, 202 (1929). (See also Riverside Respondents’ Brief at 18, “. . . a court must examine whether ‘a purchaser of Torrens Property [had] actual knowledge of a prior, unregistered interest in the property.’ . . . the *Crablex Mortgage* itself references -- by

abstract document number -- the Easement Agreement [.]) (emphasis added; brackets in original).

E. FIRST TRUST DID NOT “CONSENT” TO THE RIVERSIDE EASEMENTS.

Without citing a single authority to support its position, the Riverside Respondents claim that First Trust’s 1988 “consent” to the Riverside Easements subordinates the Mortgage to those easements. No authority is cited because this position ignores and is contrary to the obvious, and widely recognized, difference between a consent and a subordination. (*See Appellant’s Brief at 38-39*).

F. CRABLEX’S “KNOWLEDGE” OF THE RIVERSIDE EASEMENTS IS NOT RELEVANT.

The Riverside Respondents go to great lengths to show that Crablex had knowledge of the Riverside Easements when it acquired the Mortgage, and then conclude that this knowledge deprives Crablex of good faith purchaser status. Crablex readily admits that it had knowledge of the Riverside Easements and other encumbrances when it acquired the Mortgage, most of which were signed and recorded subsequent to the Mortgage.

The Riverside and other respondents take the incredible position, however, that the sale of a senior mortgage subordinates it to all junior interests, simply because any purchaser will have knowledge of the junior interests from examining the record before the sale. The recording system would be devastated if the title of a seller could be impaired in the manner suggested by the respondents. Imagine if mortgages acquired by Federal National Mortgage Association (Fannie Mae) in the secondary mortgage market

were subject to all encumbrances that might be known to Fannie Mae agents and employees at the time Fannie Mae acquired the mortgages, either because of their actual knowledge or because encumbrances had been given and recorded following recording of the mortgages.

II. CRABLEX IS ENTITLED TO JUDGMENT AGAINST THE CITY OF MINNEAPOLIS.

The City of Minneapolis (the "City") argues that a foreclosure by action does not extinguish the interests of parties not joined in the action and that the holder of an easement has a right to redeem from the foreclosure sale under Minnesota law.

A. THE FORECLOSURE SALE TERMINATED THE CITY'S JUNIOR ENCUMBRANCES.

As it did in the trial court, the City erects a straw man, and then proceeds to knock it down. The City goes to great lengths to argue that an omitted party is not bound by a judgment in a foreclosure by action. Crablex agrees. The judgment in a foreclosure by action does not determine the existence, validity or priority of an encumbrance held by a party omitted from the action, all of which claims can be raised by the omitted party in a subsequent action, as the City has raised them in these Proceedings Subsequent.

As discussed in Appellant's Brief, it is the foreclosure sale that extinguishes junior interests of omitted parties, subject to rights of redemption, if any, and a right of judicial determination of priority. This is the clear effect of *Northwest Trust Co. v. Ryan*, 132 N.W. 202 (1911), which indicates that the foreclosure sale in a foreclosure by action terminates the subordinate interest of an omitted party, but does not eliminate redemption rights, if any. If the law was as the City contends, *Ryan* would have held either that a re-

foreclosure was required, or that nothing could be done to eliminate the junior interest of the omitted party. It instead held that the omitted party, who would have had a right of redemption if made a party to the foreclosure, should get that right of redemption.

B. THE CITY HAS NO RIGHT OF REDEMPTION.

In its brief, Crablex explained that the City, as an easement holder, does not have redemption rights, and is therefore entitled only to a judicial determination of priority, which it is obtaining in these Proceedings Subsequent. In response, the City argues that (i) this is an argument that Appellant cannot make because it is being raised for the first time on appeal, and (ii) an easement holder has rights of redemption under Minnesota law.

Crablex did argue in the trial court that it is the sale, not the judgment, that extinguishes the City's junior easements. (Addendum to Brief of Riverside Plaza L.P., et al. ("Riverside Addendum") 18-19). The trial court itself recognized the linkage between the effect of sale and the presence or absence of redemption rights, because in discussing Crablex's position, it cited with apparent approval a secondary source stating that the interests of a party omitted from a foreclosure by action are protected only if the party has the right to redeem. (Riverside Addendum 19). Crablex's position that the City has no right of redemption is not a new argument raised for the first time on appeal.

Even if the argument was new, however, the claim was most certainly made below. As such, related arguments in support of the claim that the City has no redemption rights can be made under the line of cases addressing what can, and cannot,

be raised for the first time on appeal. (See cases cited above at page 9, discussing similar argument made by the Riverside Respondents).

And even if Crablex could not advance its right of redemption argument under the general rules established by Minnesota case law, the argument is permitted under the exceptions to the general rules set forth in *Watson v. United States Auto Ass'n.*, 566 N.W.2d 683, 687-688 (Minn. 2007). In that case, the Minnesota Supreme Court said that:

“an appellate court may base its decision upon a theory not presented to or considered by the trial court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question . . . Factors favoring review include: the issue is a novel legal issue of first impression; the issue is raised prominently in briefing . . . and the issue is not dependent on any new or controverted facts.”

Watson, 566 N.W.2d at 687-88.

Crablex's argument based upon an easement holder's lack of redemption rights fits squarely within *Watson*. The argument is decisive on the rights of the City as a party omitted from the foreclosure action, for it eliminates claims based upon the City's omitted party status and limits the City's rights to the issues of priority raised in these Proceedings Subsequent. The question of whether an easement holder has redemption rights is novel, for the City's cases make it clear that the question has not been answered by the Minnesota Supreme Court or the Court of Appeals. It is also strictly a legal question, not dependent on any disputed facts. The question was raised prominently in Appellant's brief, and it is considered extensively in the briefs of the City and Cedar Cultural Center. It is therefore properly before this Court on appeal.

Minnesota Statutes § 581.03 provides that, if a mortgagee obtains a judgment for foreclosure in a foreclosure by action, the court shall direct the sheriff “*to proceed to sell the [Mortgaged Premises] according to the provisions of law relating to the sale of real estate on execution . . . [.]*” *Id.* Execution sales are governed by Minnesota Statutes § 550. § 550.24(b) in that Chapter gives a right of redemption from foreclosure sale to “*the debtor’s heirs, successors, legal representatives or assigns.*” If there is no redemption pursuant to § 550.24(b), § 550.24(c) gives redemption rights to “*creditors having a lien, legal or equitable.*” See Minn. Stat. §§ 550.24(b) and (c).

In its brief, Crablex explained that the City, as an easement holder, does not have a right of redemption under the provisions giving redemption rights to creditors. Crablex’s Brief did not address owner-based redemption rights (because they are not applicable), but we will respond those arguments here.

The City claims redemption rights on the theory that, in a foreclosure by action, an easement holder is entitled to redeem by exercising the redemption rights of the land owner. Its owner-based redemption rights, it claims, are not based upon Minnesota Statutes § 550.24(b), which limits the right of redemption to “*the debtor, the debtor’s heirs, successors, legal representatives or assigns,*” and which clearly does not include easement holders. Instead, the City claims its redemption rights are based upon Minnesota Statutes § 581.10, which refers to redemption by “*the mortgagor, or those claiming under the mortgagor.*” The City, however, still cites no authority for its position that an easement holder has redemption rights. It does cite to *Morey v. City of Duluth*, 71 N.W. 694 (Minn. 1897), involving foreclosure on a city street, but in that case

the city was the fee owner of the parcel subject to the mortgage, not an easement holder as is the City here.

The City's argument based upon § 581.10 raises two questions. First, in a foreclosure by action, are owner-based redemption rights governed by § 550.24(b) or § 581.10? Second, if they are based upon § 581.10, are the owner-based redemption rights in § 581.10 broader than those set forth in § 550.24(b), or are they just a shorthand reference to the rights of the debtor, his heirs, successors, legal representatives, or assigns?

The City argues that while Minnesota Statutes § 581.03 "*governs the sheriff's sale procedures set forth in Chapter 550,*" the sale is not subject to redemption under § 550.24. The argument is without merit. It is clear from Minnesota Statutes § 581.01, Chapter 550 and from controlling case law that all of the Chapter 550 provisions relating to foreclosure, including redemption rights, apply to a sale made pursuant to § 581.03.

Chapter 550 sets forth comprehensive provisions governing real estate sales made in accordance with its terms, including those made pursuant to § 581.03. *See, e.g.,* Minn. Stat. §§ 550.19, 550.20, 550.22, 550.26 and 550.27. § 550.18 requires posting and publication of the notice of sale. § 550.19 requires service of the notice on the judgment debtor. § 550.20 specifies the time, place and manner of sale. § 550.22 specifies the form, manner of execution, acknowledgement, recording and legal effect of the Certificate of Sale. § 550.26 specifies the manner of redemption, and § 550.27 the effect of redemption.

Contrary to what the City claims, it is clear that it is not only the “sale procedures” in Chapter 550 that apply to sales in a foreclosure by action. By its terms, § 550.22, which specifies the legal effect of the Certificate of Redemption, including a provision that an unredeemed sale extinguishes encumbrances arising after the date of the foreclosed lien, specifically applies not only to execution sales, but also sales made “pursuant to a judgment or order.” This language confirms that Chapter 550’s comprehensive provisions apply to mortgage foreclosure sales in a mortgage foreclosure by action (which are made “pursuant to a judgment or order”), and there is no basis to pluck § 550.24 from this thicket of comprehensive provisions.

An early Minnesota case makes it clear that § 550.24 governs redemption in foreclosures by action. In *Stone v. Bassett*, 4 Minn. 298, 4 Gil. 215, 1860 WL 2849 (1860), the Minnesota Supreme Court held as follows:

“If then, there be but one form of action, and the statutes concerning civil actions apply as well to suits in equity as actions at law, is there any reasonable grounds for distinguishing sales of real estate, made by order or judgment...for the foreclosure . . . of mortgages from other sales of execution?...Why, then, should the right of redemption attach to a sale in one instance and not the other?...The Act of May 5, 1853 expressly says, that proceedings for the foreclosure...of mortgages are to be governed by the proceedings prescribed in civil actions. Shall we, then, adopt all the provisions of the statutes concerning civil actions and proceedings, and the rights of parties therein, both before and after judgment, and except alone those which relate to the right of redemption? We do not think there is any warrant for such distinction.”

Stone, 1860 WL 2849 at *5 (emphasis added).

Minnesota Statutes § 581.10 was not in effect in 1860, but its enactment cannot be read as an implied repealer of the redemption provisions of § 550.24 as they apply to a mortgage foreclosure sale. § 581.10 is intended for very limited purposes. It sets forth

the period of redemption and the interest rate payable in the event of redemption. Unlike Chapter 550 (and Minnesota Chapter 580, which provides for non-judicial sale), neither § 581.10 nor any other provision in Chapter 581 deals with foreclosure sale or redemption in any of their necessary details. There are no provisions dealing with the legal effect of the Certificate of Sale, or the form, manner or effect of redemption. § 581.10 simply establishes the redemption period and interest rate that apply if there is a redemption pursuant to § 550.24. The § 581.10 reference to redemption rights of “*the mortgagor, or those claiming under the mortgagor,*” is therefore a shorthand reference to the redemption rights of “*the debtor, the debtor’s heirs, successors, legal representatives or assigns*” as set forth in § 550.24(b), just as the § 581.10 reference to redemption rights of “*creditors having a lien*” is shorthand for the redemption rights of “*creditors having a lien, legal or equitable,*” as set forth in § 550.24(c).

Even if § 581.10 were read to create a right of redemption, and not just to establish the redemption period and interest payable in redemption, there is no basis to conclude that the reference in § 581.10 to redemption by the “*mortgagor, or those claiming under the mortgagor*” creates a broader right of redemption than the rights created by § 550.24. Like § 550.24, Minnesota Statutes § 580.23, which applies to foreclosures by advertisement, limits owner-based redemption rights to “*the mortgagor, the mortgagor’s personal representatives and assigns.*” Thus, it is clear that the owner-based redemption rights in the case of foreclosure by advertisement and in the execution of a judgment are limited to those with an ownership interest in the property, and it makes no sense to read

§ 581.10 to create redemption rights in a foreclosure by action that are greater than those that apply to non-judicial foreclosure or execution sales.

This conclusion is confirmed by the reference in § 581.10 to redemption by “creditors having a lien.” Under §§ 580.24 and 550.24(c), “creditors having a lien, legal or equitable,” are given the right of redemption. This formulation is broader than “creditors having a lien,” as set forth in § 581.10, so the City would, according to its arguments, read § 581.10 to create owner-based redemption rights that are broader than those created by Chapters 580 and 550; and to create creditor or lienholder redemption rights that are narrower than those enjoyed in foreclosures by advertisement or in execution sales. This makes no sense.

The conclusion is also confirmed by looking at the effect of an owner-based redemption. Under Minnesota Statutes §§ 580.27 and 550.27, an owner-based redemption annuls the foreclosure sale. This means that if an easement holder exercised owner-based redemption rights, it would not acquire title, but would only restore title in the landowner, subject to the redeeming party’s easements. It is hard to imagine that an easement holder would pay to restore another party’s title: it makes no sense to interpret § 581.10 as creating an owner-based redemption right for a party without an ownership interest to protect.

The annulment of sale provisions of the foreclosure statutes are important for yet another reason. The City seems to assume that, if it has redemption rights, the legal effect of not joining it in the foreclosure action is to preserve its easements without payment or exposure on its part; but this is clearly not the case. Under the *Ryan* case, the

City would have only an owner-based redemption right, which would give it the right for six months to pay about \$90 million to Crablex to redeem from the foreclosure sale, only to restore title to Cedar Riverside Land Company.

III. CRABLEX IS ENTITLED TO JUDGMENT AGAINST CEDAR CULTURAL CENTER.

In its brief, Cedar Cultural Center takes a number of positions, which we will respond to in order.

A. CEDAR CULTURAL CENTER'S JUNIOR ENCUMBRANCES WERE TERMINATED BY THE FORECLOSURE SALE.

Cedar Cultural Center argues that its easement in the mortgaged property was not extinguished by the foreclosure sale. This matter is fully addressed in Appellant's Brief and in Crablex's reply to the City of Minneapolis brief, above. (*Supra*, pages 14-15; App. Br. 42-45).

B. CEDAR CULTURAL CENTER HAS NO RIGHT OF REDEMPTION.

Cedar Cultural Center was not joined in the foreclosure action. As it did with the City, Crablex conceded that, as an omitted party, Cedar Cultural Center was not bound by the judgment in the foreclosure action. It is entitled to a judicial determination of the relative priority of its easement and the Mortgage through which Crablex holds title, and these Proceedings Subsequent are giving it its day in court. Crablex explained, however, that Cedar Cultural Center's junior easement was extinguished by the foreclosure sale, and that, since Cedar has no right of redemption from foreclosure sale, its only right

arising from its omitted party status is its right to a judicial determination of priority. (App. Br. 42-45).

In its brief, Cedar Cultural Center argues, as did the City, that it has a right of redemption and Crablex may not argue on appeal to the contrary. Cedar Cultural Center's positions are fully addressed above in response to the City's identical arguments, and in Crablex's Brief. (*Supra* at 14-20; App. Br. 42-45).

In footnote 10 on page 14 of its brief, Cedar Cultural Center makes an omitted party argument not made by the City of Minneapolis. There, it argues that its constitutional rights to procedural due process of law would be violated by a holding that its easement was extinguished by foreclosure proceedings in which it was not joined. That argument, however, ignores the facts that Cedar Cultural Center is not bound by the foreclosure judgment, and that it has its day in court through these Proceedings Subsequent. In these Proceedings, Cedar Cultural Center can raise every claim and defense it could have raised had it been a party to the Foreclosure Action.

C. CRABLEX IS A GOOD FAITH PURCHASER.

Cedar Cultural Center argues that Crablex was not a good faith purchaser because (i) Crablex had knowledge of the Cedar easements when it acquired the Mortgage; (ii) Crablex was under common control with Cedar Riverside Land Company ("CRLC"), the landowner; and (iii) Crablex's affiliation with CRLC in effect made Crablex both mortgagor and mortgagee.

The knowledge issue is fully addressed, above, in response to the Riverside Respondents' identical arguments. The claims based on common control and alleged

dual mortgagor-mortgagee status are fully addressed on pages 40 and 41 of Appellant's Brief. Neither Cedar Cultural Center nor the trial court cites to any relevant case on either of these points. And, on the claimed dual mortgagor-mortgagee status, the trial court itself recognized that CRLC and Crablex were not, in fact, under common ownership.

D. ESTOPPEL AND LACHES DO NOT APPLY.

The doctrine of estoppel requires a showing that the action, inaction or representation of the estopped party has prompted detrimental reliance by the aggrieved party. The only detrimental reliance cited by Cedar Cultural Center is the loss it will suffer if its junior easements are terminated through foreclosure of the Mortgage. But the loss of junior easements does not demonstrate any detrimental reliance on anything Crablex did or did not do. When Cedar Cultural Center acquired its easement in 1989, the Mortgage was held by First Trust. At that time, Cedar Cultural Center assumed the risk that foreclosure of the Mortgage would extinguish its junior easement.

Crablex did not acquire its interest in the Mortgage until 1994, so Cedar Cultural Center obviously did not acquire its easement in reliance on Crablex's status as mortgagee. Cedar Cultural Center's only "evidence" of Crablex-induced detrimental reliance is its claim that Crablex's "*delay in asserting its rights [through foreclosure of the First Trust Mortgage] has prejudiced Cedar due to its inability to obtain the testimony of Keith Heller, who died in 1998.*" This claim is based entirely upon sheer speculation as to the role that Keith Heller would have played if the Mortgage had been foreclosed during his lifetime. In addition, the claim assumes, without any supporting evidence

whatsoever, that the foreclosure delay was unjustifiable, and further assumes, without advancing a theory or citing authority, that Crablex owed Cedar Cultural Center a duty to act promptly foreclose upon acquisition of the Mortgage.

E. CRABLEX NEED NOT PROVE THAT IT DID NOT CONSENT TO OR RATIFY THE CEDAR CULTURAL CENTER EASEMENT.

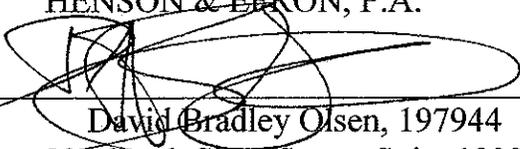
The Report of the Examiner of Titles in these Proceedings Subsequent requested evidence at the hearing before the Examiner that Crablex did not consent to or ratify the Cedar Cultural Center easement. Hinting archly without evidence that this requirement may have been prompted by the alleged “dual role” of CRLC and Crablex, but then admitting that the requirement may instead have been imposed “*for some other reason*”-- and standard operating procedure comes to mind -- Cedar Cultural Center proceeds to argue that the Examiner’s Report has the force of law in Minnesota. Minnesota law does not, of course, require a foreclosing mortgagee to prove that he has not consented to or ratified junior interests, and the Examiner’s Report cannot change that law.

Cedar Cultural Center concludes its discussion of the Examiner’s Report by further extended speculation about Keith Heller’s intent. The speculation, like all other speculation in Cedar Cultural Center’s brief relating to Mr. Heller, is not evidence.

CONCLUSION

For all of the foregoing reasons, the trial court's January 15, 2008, judgment should be reversed, and this case should be remanded with directions to enter judgment in favor of Crablex on its Petition, and against MCDA, Riverside, Capmark Finance, Inc., the City, Cedar Center and Associated Bank National Association.

Dated: May 30, 2008

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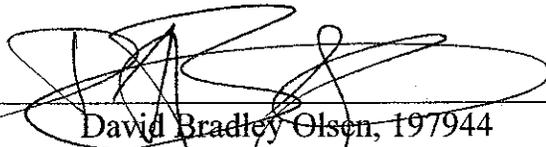
CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Minn. R. Civ. P. 132.01, Subd. 3(a)(1) and (c), the undersigned certifies that Appellant Crablex, Inc.'s Brief was prepared using Microsoft® WORD® version 2002 and complies with the typeface requirements of Rule 132.01, Subd. 1 (13 point Times New Roman font). According to the software's "Word Count" tool application the numbered pages contain 6,966 words, inclusive of all text, footnotes, headings and quotations.

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