

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Crablex, Inc.,

Court File No. A08-458

Appellant,

v.

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

Respondents.

**BRIEF AND ADDENDUM OF RESPONDENTS
RIVERSIDE PLAZA L.P., MCDA, AND CAPMARK FINANCE, INC.**

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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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INTRODUCTION

Appellant Crablex brings this appeal in an attempt to eliminate numerous long-standing easements that are essential to the operation of Riverside Plaza, a housing complex in Minneapolis with over 1,300 units. The trial court, however, correctly ruled that Crablex's claims are without merit, granting summary judgment to Riverside Plaza, L.P. ("Riverside") the Minneapolis Community Development Agency ("MCDA"), and Capmark Finance, Inc. (jointly the "Riverside Respondents"), and denying summary judgment to Crablex.

The court reached its ruling based upon four legal conclusions, any of which alone would have been sufficient to grant the Riverside Respondents summary judgment: (1) that Crablex itself entered into a valid and enforceable settlement agreement with the Riverside Respondents in 2000 stipulating to the validity of these easements and obligating it to transfer property to Riverside Plaza; (2) that a prior lawsuit and mortgage foreclosure to which Crablex clings had no bearing on the easements at issue here; (3) that Crablex's predecessor mortgagee took its mortgage "subject to" and later expressly consented to the easements again; and (4) that Crablex had actual knowledge of the easements when it took its interest in the property and thus is not a good-faith purchaser entitled to the protections of the Torrens Act. As a result, the court concluded, the easements benefiting the Riverside Respondents—as well as those benefiting Respondents City of Minneapolis and the Cedar Cultural Center—"are valid, in full force and effect, and constitute an encumbrance on the [Crablex] property." And for the same reasons, this Court should now affirm that ruling.

STATEMENT OF THE ISSUE

Easements encumber Torrens property either when filed or when a purchaser has actual knowledge of them. On summary judgment, the court below upheld the Riverside Respondents' long-standing easements based upon four legal conclusions: a valid settlement obligates Crablex to deed property to the Riverside Respondents and confirms the continuing existence of the easements; the Riverside Respondents' arguments are not barred by res judicata because prior litigation did not address the easements; Crablex's predecessor took "subject to" and consented to the easements; and Crablex took its interest with actual knowledge of all the easements. Did the trial court err in granting summary judgment to the Riverside Respondents?

Holding I: The Settlement Agreement executed by all the parties in 2000 is conclusive and enforceable despite the lack of one attorney's signature.

Apposite law on holding I:

Minn. R. Prof. Conduct 1.2(a)
Naylor v. Stene, 104 N.W. 685 (Minn. 1905)

Holding II: Because prior litigation never examined the existence or validity of the easements, res judicata does not bar the Riverside Respondents' arguments now.

Apposite law on holding II:

State v. Joseph, 636 N.W.2d 322 (Minn. 2001)
Smith v. Smith, 51 N.W.2d 276 (Minn. 1952)

Holding III: The Riverside Plaza Easements continue to exist because Crablex's predecessor took "subject to" them in 1971 and consented to them in 1988.

Apposite law on holding III:

State v. Hess, 684 N.W.2d 414 (Minn. 2004)
Farmers & Merchants Bank of Preston v. Junge, 458 N.W.2d 698 (Minn. Ct. App. 1990)

Holding IV: Crablex had actual knowledge of the Riverside Plaza Easements and is therefore not a good-faith purchaser entitled to the protections of the Torrens Act.

Apposite law on holding IV:

In re Collier, 726 N.W.2d 799 (Minn. 2007)

STATEMENT OF THE FACTS

The Riverside Respondents incorporate the trial court's statement of facts in the attached October 29, 2007 Order on Summary Judgment Motions (Add. 3-16).¹

For reference purposes, the following table outlines the terminology used in this brief to refer to the easements at issue.

<u>TABLE: THE RIVERSIDE PLAZA EASEMENTS</u>	
"Riverside Plaza Easements" (All easements now held by Riverside Respondents over Crablex Property)	E-Building Parking & Utility Easement Exterior Maintenance Easement Tank & Tower Easement McKnight Driveway Easement Gas Line Easement 17 th Avenue Water & Sewer Easement 17 th Avenue Gas Line Easement
"Schedule A Easements" (Easements permitted according to Schedule A of the Mortgage)	E-Building Parking & Utility Easement Exterior Maintenance Easement Tank & Tower Easement
"Consented Easements" (Easements expressly consented to by First Trust with 1988 Consent to Easements document)	E-Building Parking & Utility Easement Exterior Maintenance Easement Tank & Tower Easement McKnight Driveway Easement Gas Line Easement
"Settlement Agreement Property" (Parcels to be conveyed by quit claim deed to Riverside Plaza under 2000 Settlement Agreement)	Tank & Tower Easements McKnight Driveway Easement [Narrow 4-foot strip of land between them]
"Terminated Driveway Easements" (Easements found terminated under 1974 Agreement for Relocation of Easements in earlier trespass/foreclosure action)	Chase House Driveway Vacated 5 th Street Driveway Small eastern edge driveway

¹ Crablex did not argue at the trial court, and does not argue on appeal, that there are any issues of material fact preventing summary judgment.

ARGUMENT

I. Standard of review.

“The standard of review applicable to a grant of summary judgment is whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Hempel v. Creek House Trust*, 743 N.W.2d 305, 310 (Minn. Ct. App. 2007). “Summary judgment is appropriate [when] there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). Crablex does not argue on appeal that there were any issues of material fact that should have precluded summary judgment.² Accordingly, the Court need only determine whether Respondents Riverside Plaza, MCDA, Capmark, City of Minneapolis, and Cedar Cultural Center were entitled to judgment as a matter of law.

II. Under the Settlement Agreement, Crablex must convey property to Riverside and may not challenge the validity of the Riverside Plaza Easements.

A. *The Settlement Agreement is enforceable against Crablex because its own principal signed.*

Crablex argues that the parties’ 2000 Settlement Agreement—pursuant to which it is obligated to transfer the Settlement Agreement Property to Riverside and is barred from challenging the existence of the Riverside Plaza Easements—cannot be enforced against Crablex because it was never signed by Daniel Rosen, counsel for CRLC. (App.

² Indeed, the trial court ruled in favor of respondents on cross-motions for summary judgment brought by each of the parties to this action. Crablex thus conceded that it did not believe there were any issues of material fact to be weighed and decided.

Br. 27.)³ Minnesota law, however, adheres to the firmly established rule that “a party who signs and delivers an instrument is bound by the obligation he therein assumes, although it is not executed by all the parties for whose signatures it was prepared.” *Naylor v. Stene*, 104 N.W. 685, 686 (Minn. 1905) (citing *Mattoon v. Barnes*, 112 Mass. 463, 466 (1873); *Dillon v. Anderson*, 43 N.W. 231, 235 (Iowa 1870); *Richards v. Whitaker*, 134 Pa. 191 (1890); *Russell v. Freer*, 56 N.Y. 67 (1874); *Hurd v. Kelly*, 78 N.Y. 588 (1879); *Adams v. Bean*, 12 Mass. 137 (1815); *Goodyear, etc., Co. v. Bacon*, 151 Mass. 460 (1890); *Underhill v. Harwood*, 10 Ves. Jr. 212; *Sidney Road Co. v. Holmes*, 16 Up. Can. Q. B. 268; *Elliott v. Davis*, 2 B. & P. 338).

Accordingly, as the trial court below held, Crablex is bound by terms of the Settlement Agreement because—even though Rosen did not sign the agreement as counsel for CRLC—all *parties* to the agreement did sign the document, including Crablex itself. (Add. 23.) Furthermore, Crablex’s president, Victoria Heller, signed only after Crablex’s counsel “explained its provisions to her in considerable detail.” (AA 737.) Following that explanation, Heller signed the document in her capacity both as president of Crablex and as general partner of CRLC. As a result, “the Settlement Agreement is valid and subject to enforcement by [the] Court pursuant to its terms.” (Add. 23.)

³ Citations herein to “App. Br.” are to Appellant’s Brief; citations to “Add.” are to the Addendum to this brief; citations to “AA” are to Appellant’s Appendix; and citations to “RA” are to the Respondents’ Joint Appendix.

Crablex attempts to avoid enforcement of the Settlement Agreement by arguing that CRLC could not assent to the agreement because it was presented to CRLC's general partner, Victoria Heller, in the absence of CRLC's counsel. (App. Br. 28–29.) This argument fails, however, based upon plain, black-letter law. Minnesota law has long held that parties may settle cases with or without their attorneys. *Weikert v. Blomster*, 6 N.W.2d 798, 799 (Minn. 1942) (“We recognize the rule that a party may settle a controversy without advising his attorney of it.”); *Nielsen v. City of Albert Lea*, 98 N.W.195, 196 (Minn. 1904) (“[S]ettlements fairly made between the parties, even though the attorneys be not consulted or informed thereof . . . should be sustained.”); Minn. R. Prof. Conduct 1.2(a) (stating that a “lawyer shall abide by a client’s decision whether to settle a matter”); see also *In re Patterson*, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999) (“[A]n attorney is only an agent. A party may settle a case with or without an attorney.”). Cf. *Robertson v. Chen*, 52 Cal. Rptr. 2d 264, 265 (Cal. App. 2 Dist. 1996) (holding that a settlement agreement signed by a party’s attorney alone is not enforceable and that the party itself must be the one to sign). Consequently, because it was signed by all of the contemplated parties, the Settlement Agreement in this case must be upheld. (AA 687–706.) As the trial court below held, “it is legally irrelevant that the CRLC’s attorney did not execute it. Consent of the parties, not their attorneys, is all that is required to create an enforceable settlement agreement.”⁴ (Add. 24.)

⁴ Crablex also claims that Minnesota Rule of Professional Conduct 4.2—prohibiting a lawyer from communicating directly with a party known to be represented by another lawyer—constitutes a legal standard for validity of an agreement and trumps all of

Crablex next argues, without support, that “[t]he claimed settlement agreement plainly was not intended to be effective until signed by all those for whom signature blocks were provided.” (App. Br. 27.) Under Minnesota law, however, parol evidence of parties’ “intent” is irrelevant when the terms of an agreement are unambiguous. *Hous. and Redev. Auth. of Chisholm v. Norman*, 696 N.W.2d 329, 337 (Minn. 2005). And as the court below found, “[t]he terms and provisions of the Settlement Agreement speak for themselves and the parties’ disputes as to intent do not create a genuine issue of material fact that would preclude entry of summary judgment.” (Add. 22 n.10.) Specifically, the Settlement Agreement itself states plainly on page one that it “is made and entered into between Crablex, Inc., Cedar Riverside Land Company, Riverside Plaza Limited Partnership, and the Minneapolis Community Development Agency” (AA 687); it does not, in contrast, state that any attorney is a party to the agreement. As a result, Crablex may not attempt to argue that the parties actually intended something other than what the agreement plainly states.

Crablex cites two cases for the apparent proposition that no contract exists where the parties believe that some future writing or other condition remains necessary. (App. Br. 27.) These cases are inapposite. First, in *American Federation of State, County and Municipal Employees, Council No. 14 v. City of St. Paul*, the court stated that no contract is formed “where the parties’ actions indicate an expectation that something remains to be done to establish contractual relations.” 533 N.W.2d 623, 627 (Minn. Ct. App. 1995).

contract law. (App. Br. 28–29.) Crablex, however, cites no law for the proposition that Rule 4.2 may be used to void contracts. Accordingly, this argument must fail.

That case, however, involved a “tentative agreement” that expressly stated, “[t]his constitutes a *tentative agreement* between the parties which will be recommended by the City Negotiator, *but is subject to the approval* of the Administration of the city and the City Council and is *also subject to ratification* by the Union.” *Id.* at 626 (emphasis added). Here, in contrast, the Settlement Agreement states in no uncertain terms that “[t]his Agreement and all covenants and releases set forth herein *shall be binding* upon and shall inure to the benefit of the respective *parties hereto.*” (AA 693) (emphasis added.)

The *Asbestos Products* case cited by Crablex is similarly inapposite. That case examined whether a party to a contract was bound by the terms of its own post-contract letter to the other party, altering a key term of their agreement. The Court held—in the sentence immediately after that cited by Crablex—that “where the parties have assented to all the essential terms of the contract and proceed to perform in reliance upon it, the mere reference to a future contract in writing will not negative the existence of the present, binding contract.” *Asbestos Prods. Inc. v. Healy Mech. Contractors, Inc.*, 235 N.W.2d 807, 809 (Minn. 1975). In this case, the parties’ agreement does not even contain any questionable “reference to a future contract”; instead, the parties “have assented to all the essential terms,” they “proceeded to perform in reliance,” and they are bound by that agreement.

The enforceability of the Settlement Agreement is further underscored by a number of facts surrounding its execution and the parties’ subsequent conduct. First, when the Settlement Agreement was drafted and executed, CRLC, as mortgagor, still had

an interest in the litigation and was a necessary party for carrying out any transfer of the Settlement Agreement Property. Since that time, however, CRLC has lost any interest in the Crablex Property through foreclosure and no longer has any interest in the subject matter of the agreement. (AA 505–10.)

Second, CRLC was likely a party to the agreement only because, as mortgagor, its authorization was necessary to transfer the Settlement Agreement Property to Riverside. CRLC’s name, for example, appears only nine times in the agreement, and each time, it appears in the context of either “Crablex and CRLC” or “Crablex/CRLC.” (AA 687–95.) Since foreclosure, however, the interests of “Crablex and CRLC” or “Crablex/CRLC” have now become simply the interests of “Crablex.”

Third, the parties’ and their attorneys’ conduct following the execution of the Settlement Agreement is fully consistent with the agreement’s validity. Most significantly, Crablex and its counsel made numerous objections during trial to any questioning on subjects resolved by the Settlement Agreement (RA 74, 75, 78, 80, 81, 85, 88), corresponded with opposing counsel for over two and a half years regarding the arrangements necessary for the transfer of the Settlement Agreement Property to Riverside (AA 744–52), and accepted Riverside’s \$96,000 settlement check and applied the funds toward its attorneys’ fees. (AA 715.) And Daniel Rosen, the attorney who did not sign the Settlement Agreement, circulated a proposed “amendment” to that agreement on multiple occasions. (AA 939.)

B. *The Settlement Agreement must also be enforced because Minnesota law strongly favors the finality of settlements.*

Minnesota courts recognize a strong public policy interest in the finality of settlements. *Wall v. Fairview Hosp. and Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998). A “settlement is final, conclusive, and binding upon the parties; it is as binding as any contract the parties could make, and as binding as if its terms were embodied in a judgment.” *Theis v. Theis*, 135 N.W.2d 741, 744 (Minn. 1965). The trial court therefore upheld and enforced the parties’ Settlement Agreement, noting that “the strong public policy in favor of settlements means that the Court is ‘oblige[d] . . . to enforce a stipulated agreement where the parties made a good-faith settlement on the basis of what they then understood the law to be.’” (Add. 23) (quoting *N. States Power Co. v. City of Sunfish Lake*, 659 N.W.2d 271, 274 (Minn. Ct. App. 2003)).

C. *The trial court properly ordered Crablex to comply with its obligations under the Settlement Agreement.*

Crablex asserts that the Settlement Agreement—and the trial court’s order directing it to comply with that agreement—are unenforceable because they do not contain a legal description for the property to be conveyed and thus are “subject to conditions.” (App. Br. 29–31.) As a preliminary matter, Crablex is barred from making this argument now because it never did so at the district court. And under well-established law, appellate courts “decline to address matters raised for the first time on appeal.” *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 615 (Minn. Ct. App. 2007); *see also Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 130 (Minn. 2007).

Even if the Court were to consider this argument, however, it must fail. A “condition” is “[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance.” *Black’s Law Dictionary* 312 (8th ed. 2004). Contrary to Crablex’s assertion, the Settlement Agreement is not subject to any “conditions.” The Settlement Agreement Property consists of two long-existing easements with precise legal descriptions and one four-foot-wide strip of land sandwiched between and lying directly adjacent to the two existing easements. (AA 687–706.) All parties to the agreement thus knew—and depicted on a detailed survey in Exhibits C, D, and E to the agreement—precisely what property the quit claim deed must encompass. *See, e.g., Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966) (“The construction which the parties in their dealings and by their conduct have placed upon the terms will furnish the court with persuasive evidence of their meaning.”). And neither at the signing of the Settlement Agreement, nor at any time prior to appeal, did Crablex raise any concern about a lack of specificity in the agreement or a “condition” that must be satisfied. This argument therefore fails.

Finally, Crablex cites the *Boulevard Plaza* case on appeal to argue that the trial court had no right to enforce the Settlement Agreement as “final, conclusive, and binding” because Riverside “allowed the claimed agreement to lay dormant for over six years.” (App. Br. 32.) The conclusion that Crablex urges, however, is wholly unsupported by the very case it relies on. While the Court in *Boulevard Plaza* did refuse to enforce a contract for the sale of real estate, that decision was based on a variety of key

facts—a time-is-of-the-essence clause and complete non-performance of any contract term for over 18 months after its execution, among other things—facts nowhere present in this case. *Boulevard Plaza Corp. v. Campbell*, 94 N.W.2d 273, 382 (Minn. 1959). As the trial court found, “[a]t no point” during lengthy post-settlement communications “did Crablex ever argue that the Settlement Agreement was not valid or enforceable.” (Add. 13–14.)

III. The Foreclosure/Trespass Action did not address the continuing existence and validity of the Riverside Plaza Easements.

A. *The doctrine of res judicata does not prevent the Riverside Respondents from asserting their defenses and counterclaims in these Proceedings Subsequent.*

Crablex argues that, under the doctrine of res judicata, the Riverside Respondents may not assert any of their defenses or counterclaims in this litigation because they allegedly constitute claims that “were or could have been litigated in the Foreclosure Action.”⁵ (App. Br. 19.) This argument is meritless. Res judicata bars litigation of a claim if “(1) the earlier claim involved the same claim for relief; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter.” *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001). And in determining whether a party had a “full and fair opportunity to litigate the matter,” a court examines “whether there were

⁵ Significantly, Crablex does *not* argue on appeal that the defenses and counterclaims of the Riverside Respondents are barred by the doctrine of collateral estoppel, which “concerns issues that *were actually litigated*, were determined, and were essential in a prior action.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (emphasis added).

significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties.” *Id.* at 328 (quoting *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1521 (10th Cir. 1990)).

Res judicata has no bearing on the defenses or counterclaims by the Riverside Respondents in this action for at least three primary reasons. First, the Riverside Respondents never asserted in this case the “same claim for relief”—or even the same defenses—that they asserted in the Foreclosure/Trespass Action. (AA 126–37; AA 343–48.) As the trial court noted with respect to the Foreclosure/Trespass Action, Crablex “did not seek a declaration as to the priority of its interest over any other interests [other than the Terminated Driveway Easements] held by the Riverside Respondents” (Add. 20); the orders entered in the matter “repeatedly noted that the only dispute as to the priority presented to it related to the [Terminated Driveway Easements]” (Add. 20); the court’s decision was specifically limited “to a determination of the priority of ‘said terminated easements’” (Add. 20); the court “did not declare *all* encumbrances held by the Riverside Respondents to be terminated” (Add. 20); and pursuant to a stipulation among the parties, the court “withdrew any language indicating that the Court had determined that the Riverside Respondents had no continuing interest in the Property.” (Add. 20.) Consequently, res judicata does not bar the Riverside Respondents’ defenses or counterclaims in this action.

Second, the Riverside Respondents never had a “full and fair opportunity” in the Foreclosure/Trespass Action to litigate the defenses and counterclaims on which they

prevailed below in this action. The only easements challenged by Crablex in the Foreclosure/Trespass Action were the three Terminated Driveway Easements. Specifically, Crablex sought a declaration that the interests of the Riverside Respondents “in the Encroached Premises *for driveway, access and parking purposes* be adjudged and decreed inferior to plaintiff’s lien . . . and that [they] be foreclosed and barred from any right, title or interest to the Encroached Premises *for driveway, access and parking purposes.*” (Add. 20) (emphasis added.) Crablex never argued in that litigation that the Riverside Plaza Easements were in any way invalid or would not survive its foreclosure of the Crablex Mortgage. (Add. 10–11.) The Riverside Respondents, therefore, had no cause to assert the continuing validity of the Riverside Plaza Easements in that action. Quite simply, those easements were not at issue.

Third, it is also established law in Minnesota that a judgment “will not act as a bar” to the subsequent litigation of issues that were or could have been litigated, but were not due to a settlement. *Smith v. Smith*, 51 N.W.2d 276, 279–81 (Minn. 1952). As a result of the Settlement Agreement, the trial court, following the trespass-damages trial, expressly stated in its February 15, 2001 order that “[t]rial was held on the issue of whether Crablex, Inc. should be awarded damages for trespass on [the Terminated Driveway Easements]. The other claims raised in Crablex’s Complaint and [Riverside’s] Counterclaim were settled pursuant to a Settlement Agreement dated February 17, 2000.” (AA 423.) As such, even if the parties and the court had originally believed the Riverside Plaza Easements were in dispute in the Foreclosure/Trespass Action, the Settlement Agreement conclusively established their continuing validity. Further, under *Smith*, a

final judgment can never bar an action to enforce a partial settlement reached prior to judgment. And as a matter of simple logic, Minnesota's strong and unambiguous public policy favoring settlement agreements would plainly be undermined by a holding that a partial settlement is unenforceable once judgment has been entered on the claims that remained after the settlement.

Crablex's entire argument in support of res judicata rests on a single, flawed proposition: that because the trial court granted it a decree of foreclosure subject to "prior encumbrances of record" in 2005, the court must have also determined the priority of any such "encumbrances." (App. Br. 19–26.) Crablex's argument fails because, as the trial court in this action also stated, "the Court's Orders repeatedly noted that the only dispute as to priority presented to it related to the [Terminated] Driveway Easements." (Add. 20.) And as discussed in the trial court's memorandum, "[t]he Court did not make any determination as to the priority of Crablex's interest in the Mortgage over the Riverside [Plaza] Easements." (Add. 21.) As a result, Crablex's attempt to assign any significance to the words "prior encumbrances of record" in the decree of foreclosure is without merit.

B. *Crablex is barred by res judicata from arguing that the Riverside Plaza Easements no longer exist.*

Crablex's attempt to assert res judicata as a bar to the Riverside Respondents' defenses and counterclaims presents the matter wholly upside down, because—if indeed any claims are barred by res judicata—it is Crablex's claims in this action. Throughout the lengthy and hard-fought Foreclosure/Trespass Action, Crablex only placed the

Terminated Driveway Easements in issue. (Add. 20.) Had it truly believed that all easements benefiting the Riverside Respondents were junior and subordinate to the Crablex Mortgage, Crablex surely would not have expended the substantial resources that it did arguing that the 1974 Relocation Agreement extinguished only the Terminated Driveway Easements. Instead, it would have argued that *all* easements over the Crablex Property would be extinguished as a simple result of its foreclosure sale. Consequently, Crablex's claims against the Riverside Respondents in this action constitute claims that "could have been litigated" previously but were not. Accordingly, it is Crablex that is now barred from asserting that the Riverside Plaza Easements are terminated.

IV. Crablex may not seek to eliminate the Riverside Plaza Easements because its predecessor mortgagee took its mortgage "subject to" the easements and later consented to them again.

A. *The Crablex Mortgage was made expressly subject to the Schedule A Easements.*

In response to Crablex's Petition in this matter, the Hennepin County Examiner of Titles issued a report requiring that, if Crablex seeks to terminate the Riverside Plaza Easements, Crablex must establish that neither it nor its predecessor consented to the easements. (AA 76–82.) According to the plain language of the Crablex Mortgage, however, Crablex's predecessor took its mortgage expressly subject to "(i) the restrictions, exceptions, reservations, limitations, interests and any other matters referred to in Schedule A hereto, and (ii) other *Permitted Encumbrances*." (AA 595) (emphasis in original.) Schedule A, in turn, renders the mortgage subject to nearly 200 encumbrances, including the "[n]on-exclusive private easement" over portions of the Crablex Property

“as set forth in Document No. 3920762 Office of Register of Deeds.” (AA 613.) And Document No. 3920762 creates and describes the E-Building Parking & Utility Easement, the Exterior Maintenance Easement, and the Tank & Tower Easement (jointly the “Schedule A Easements”). (AA 614–27.) Thus, Crablex’s predecessor took its Mortgage “subject to” the Schedule A Easements, and Crablex is not entitled to a new Certificate of Title free and clear of those easements. *See, e.g., State v. Hess*, 684 N.W.2d 414, 426 (Minn. 2004) (holding that “a conveyance that intends to reference a preexisting easement typically indicates that the conveyance is ‘subject to’ the easement”).

Although Crablex’s mortgage was made “subject to” the Riverside Plaza Easements, Crablex brought this action to try to remove those easements as encumbrances from the Crablex Property. Tellingly, however, Crablex asserts that “[o]nly easements created by the original Easement Agreement” (Document No. 3920762) can be ‘Permitted Encumbrances’ under the Crablex Mortgage. (App. Br. 36.) If indeed the purpose of a mortgage foreclosure is to “provide the sale purchaser with a title identical to that of the mortgagor as of the time the mortgage was executed,” then at best Crablex could now obtain title subject to the Schedule A Easements as they existed at the time the Crablex Mortgage was executed—not, as Crablex requests, “free and clear” of all the Riverside Plaza Easements. *Farmers & Merchants Bank of Preston v. Junge*, 458 N.W.2d 698, 700 (Minn. Ct. App. 1990). Crablex has thus impermissibly used this action to attempt to take more property than was encumbered by its mortgage.

Crablex additionally argues that, “[b]ecause the Easement Agreement was ‘off record’ for Torrens purposes, it was [the Riverside Respondents’] burden to show that [Crablex’s predecessor] had ‘actual knowledge’ that [the Easement Agreement] was intended to affect Torrens, as opposed to abstract property at the time the Mortgage was made.” (App. Br. 37.) As an initial matter, Crablex’s argument defies logic, because knowledge of whether an encumbrance “was intended to affect Torrens” property is irrelevant; instead, a court must examine whether “a purchaser of Torrens property [had] actual knowledge of a prior, unregistered interest in the property.” *In re Collier*, 726 N.W.2d 799, 809 (Minn. 2007) (emphasis added). And it cannot be disputed that Crablex’s predecessor had “actual knowledge” of the Schedule A Easements: the Crablex Mortgage itself references—by abstract document number—the Easement Agreement that created those easements. (AA 613.) Accordingly, the trial court in this matter correctly found that “[Crablex’s predecessor] consented to the Riverside Easements . . . in 1971.” And as a result, the court held, “Crablex cannot eliminate them through foreclosure.” (Add. 27.)

B. *Crablex’s predecessor executed a Consent to Easements authorizing the Riverside Plaza Easements to continue to encumber the Crablex Property.*

In addition to the fact that Crablex’s predecessor took its mortgage “subject to” the Riverside Plaza Easements in 1971, it also consented to them in 1988 with a document entitled “Consent to Easements.” (AA 684–86.) That document, executed by Crablex’s predecessor on December 23, 1988, “hereby consents” to the E-Building Parking & Utility Easement, the Exterior Maintenance Easement, the Gas Line Easement, the

McKnight Driveway Easement, and the Tank & Tower Easement (jointly the “Consented Easements”). (AA 684.) As a result of this document, the trial court below found “that [Crablex’s predecessor] consented to the Riverside Easements . . . in 1988 when it executed the Consent.” (Add. 27.) Thus, in accordance with that finding and the mandate of the Examiner of Titles in his report, the trial court correctly held that Crablex could not eliminate those easements through foreclosure and is not entitled to a new Certificate of Title free and clear of the Consented Easements. (Add. 27.)

V. Crablex is not good-faith purchaser because its principal, Keith Heller, had personal knowledge of the Riverside Plaza Easements prior to both the assignment and foreclosure of the Crablex Mortgage.

Under Minnesota’s Torrens Act “a purchaser of Torrens property who has actual knowledge of a prior, unregistered interest in the property is not a good faith purchaser.” *In re Collier*, 726 N.W.2d 799, 809 (Minn. 2007); *In re Juran*, 226 N.W. 201, 202 (Minn. 1929). Further, courts may not interpret the Torrens Act in such a way that a result “violates notions of justice and good faith.” *Collier*, 726 N.W.2d at 808. Because Crablex has had actual knowledge of the Riverside Plaza Easements since its inception, as discussed below, it is not a good-faith purchaser, and its title to the Crablex Property remains subject to those easements.

At the time the Superblock encompassing the Crablex Property and the Riverside Plaza Property was created and developed, Keith Heller—the deceased spouse of Crablex’s current president, Victoria Heller—wholly controlled all of the entities involved in that development. *Crablex, Inc. v. Cedar-Riverside Land Co.*, C2-02-1854 at 2 (Minn. Ct. App. 2003) (AA 478). Between 1971 and 1974, Keith Heller created and

modified the Riverside Plaza Easements by signing three documents—the Easement Agreement, the Amendment to Easement Agreement, and the Relocation Agreement—on behalf of all three entities burdened and benefited by the easements. (AA 478.) In addition to the entities involved in the development of the Superblock, Heller later established Crablex, Inc., which took over as mortgagee of the Crablex Property in 1994 and commenced foreclosure against CRLC, another Heller-controlled entity, in 1995. (AA 324–30.) Indeed, as the court below found, “Crablex’s knowledge came directly from [sic] its principal, and agent, Keith Heller, who was actively involved in the granting of these easements in favor of each of the Respondents.”⁶ (Add. 25.)

Under Minnesota law, “[a] corporation can be charged with the knowledge of its officers when the corporation consists wholly of those officers and others having notice of inconsistent claims.” *Oldewurtel v. Redding*, 421 N.W.2d 722, 726 n.3 (Minn. 1988); *see also St. Paul Fire & Marine Ins. Co. v. Fed. Deposit Ins. Corp.*, 765 F.Supp. 538, 544 (D. Minn. 1991) (“an agent’s actual [knowledge] may be imputed to such agent’s principal.”). As a result of Keith Heller’s, and later Victoria Heller’s, unique role as sole principal of virtually all business entities involved in the creation of the Riverside Plaza Easements, Crablex is charged with actual knowledge of those easements when it took its mortgage and when it foreclosed its mortgage. And as the trial court held, “[t]his is particularly [true] where, as here, affiliated corporate entities controlled by the same

⁶ Crablex does not argue on appeal that this or any other finding of the trial court stemmed from a genuine issue of material fact or that the trial court erred in its recitation of the facts.

individual were both mortgagee (Crablex) and mortgagor [CRLC].” (Add. 26.) Ultimately, “[t]his is not a case in which an unaffiliated third party took assignment of a mortgage and sought to eliminate junior interests that it had no hand in creating.” (Add. 26.) Accordingly, regardless of when the documents establishing the Riverside Plaza Easements were recorded—and even if they had *never been* recorded—“Crablex is not a good-faith purchaser of the Property entitled to protection under the Act.” (Add. 26.)

CONCLUSION

The trial court granted the Riverside Respondents summary judgment based on not just one, but four independent legal reasons. The court thoroughly and carefully reviewed each of the grounds establishing the continuing existence and validity of the Riverside Plaza Easements and correctly held (1) that the parties’ 2000 Settlement Agreement is valid and enforceable and prevents Crablex from attempting to eliminate the Riverside Plaza Easements; (2) that the Riverside Respondents’ defenses and counterclaims are not barred by res judicata because the issues were never litigated in the Foreclosure/Trespass Action; (3) that Crablex’s predecessor expressly consented to the Riverside Plaza Easements; and (4) that Crablex was not a good-faith purchaser under the Torrens Act because it took its interest with actual knowledge of the Riverside Plaza Easements. Crablex has failed to show that the court’s decision—on any of these four grounds—was erroneous. This Court should therefore affirm the trial court’s grant of summary judgment to the Riverside Respondents.

DATED: _____

5/20/08

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