

NO. A08-534

State of Minnesota
In Court of Appeals

MidCountry Bank, f/k/a
First Federal fsb,

Appellant,

vs.

Frederick C. Krueger and Nancy Krueger,
Cherolyn A. Hinshaw, PHH Home Loans, LLC,
d/b/a Burnet Home Loans, John Doe, Mary Rowe
and ABC Corporation,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. HINSHAW AND PHH'S ARGUMENTS FAIL UNDER WELL ESTABLISHED MINNESOTA LAW.

A. Hinshaw and PHH ignore their responsibility for knowledge of the Grantor/Grantee Index.

In their Brief, Hinshaw and PHH argue that they should be considered bona fide purchasers without constructive notice due to the indexing error committed by the Scott County Recorder's Office – in the Tract Index. This argument fails, however, under the following well-established Minnesota law:

- The official index of any county recorder is the grantor/grantee index. *Miller v. Hennen*, 438 N.W.2d 366, 370 (Minn. 1989).
- “The record book and the index book are not to be considered as detached and independent books, but related and connected ones, and a party is, where the index makes the requisite reference, affected with notice of any facts which **either** book contains with respect to the title of his proposed grantor.” *Latourell v. Hobart*, 160 N.W.2d 259, 261 (Minn. 1916) (emphasis added). A purchaser “is presumed to have examined the **whole record**, and he is charged with such knowledge as the proper index entries afford, as well as with notice of the facts derived from the transcript of the deed itself.” *Id.* (emphasis added).

Indeed, Hinshaw and PHH focus almost exclusively on the Tract Index. While it may very well be true that the MidCountry Mortgage was not properly indexed in the Scott County Tract Index, Hinshaw and PHH are charged with notice of what was in the Scott County Grantor/Grantee Index.

This very issue has been litigated, and decided, by the Minnesota Supreme Court in 1916 and 1989. *See generally Latourell*, 160 N.W.2d 259 and *Miller*, 438 N.W.2d

366. Both decisions weigh in MidCountry's favor and has been set out in MidCountry's initial Brief.

B. The Cases Cited by Hinshaw and PHH Are Distinguishable or Weigh in MidCountry's Favor.

Hinshaw and PHH cite numerous cases from other jurisdictions; however, those cases do not have any precedential value. *State by Ulland v. International Ass'n of Entrepreneurs of America*, 527 N.W.2d 133, 136 (Minn. App. 1995) (“this court is not bound by precedent from other states or the federal courts”) (citing *State v. Thompson*, 139 N.W.2d 490, 511, *cert. denied*, 385 U.S. 817 (1966)).

Furthermore, almost every one of those cases is distinguishable from the instant case and many are favorable to MidCountry Bank.

In re Hojnoski, 338 B.R. 282 (Bankr. W.D.N.Y. 2006), a case relied on by Hinshaw and PHH for the proposition that they are entitled to rely on the records set forth in the index, weighs in MidCountry's favor. In point of fact, the actual holding of the case does not stand for the proposition Hinshaw and PHH assert.

In *Hojnoski*, a Chapter 13 Bankruptcy Trustee sought to avoid a mortgage lien as improperly recorded. The mortgage at issue in that case showed the name “Sandra Hojnowski” rather than the debtor's actual name, “Sandra Hojnoski.” *Id.* at 283 (emphasis added). An affidavit submitted subsequent to recording attempting to correct the incorrect spelling contained an error as it listed a town different from the one where the debtor actually resided and the property was located. *Id.* In the instant case, there is no dispute that the MidCountry Mortgage contained the proper legal description for

Parcel 3.

Most importantly, however, while the court held that any error in indexing takes the recorded document outside the chain of title, the court held that the Chapter 13 Trustee could not be a bona fide purchaser. The court held that the person conducting the tract search:

could easily have either (a) gone to the physical grantor-grantee index maintained by the Steuben County Clerk's office in order to, at a minimum, obtain a more complete description of the Affidavit, in which case, based upon the court's previous assumptions, the searcher would have: (a) learned that it was an Affidavit in re Correction of Typographical Error; (ii) realized that it might relate to the recently recorded deed to the debtor; and (iii) gone to the records in the clerk's office, reviewed the Affidavit and immediately learned of the existence of the mortgage; or (b) as would have been more likely, simply checked the word 'AFFID' to instantaneously review a complete copy of the Affidavit, and immediately learned of the existence of the mortgage.

* * *

should have clicked on 'AFFID' and reviewed the document in this court's opinion, to have effectively searched the chain of title for the debtor and the residents.

Id. at 289-90.

The *Hojonski* court's holding support's MidCountry's position as Ms. Javens, on behalf of Hinshaw and PHH, should have checked the Scott County Grantor/Grantee Index and had the opportunity to actually view the MidCountry Mortgage. Ms. Boeckman testified that in May 2006, any member of the public could have viewed the contents of the MidCountry Mortgage by pressing "F13" on the keyboard in front of them. *See* A-184 – A-185. At no time prior to taking their interests in Parcel 3, did

Hinshaw or PHH (either by themselves or through Javens) review the actual contents of the MidCountry Mortgage. A-48.

In Minnesota, purchasers and searchers of the real estate records are bound by the contents within the recorded documents themselves. *See Bailey et al. v. Galpin*, 40 Minn. 319, 41 N.W. 1054, 1055 (1889) (constructive notice to that which is set forth on the face of a mortgage); *see also, Latourell*, 160 N.W. at 261 (a purchaser “is charged with such knowledge ... of the facts derived from the transcript of the deed itself.”) (emphasis added).

In *Manchester Funds, Ltd. v. First American Title Insurance Co.*, 753 A.2d 740 (N.J. Super. Ct. Law Div. 1999), the document at issue was a notice of *lis pendens* for a drug trafficking case that was improperly indexed under “United States of America” rather than the last name of the property’s title holder “Raynoso.” *Id.* at 338-39. Therefore, anyone searching the grantor-grantee index for the property owner’s name would not be alerted to the notice of *lis pendens*. *Id.*

In this case, there is no dispute that the MidCountry Mortgage was indexed under the Scott County Grantor/Grantee Index under Mr. and Mrs. Krueger’s last name in May 2006. *See* A-189 (Ms. Boeckman testifying that the MidCountry Bank mortgage did appear in the Grantor/Grantee index as of May, 2006).

In *Federal National Mortgage Association v. Levine-Rodriguez*, 579 N.Y.S.2d 975 (N.Y. Supp. Ct. 1991), a deed to Levine-Rodriguez had no hyphen and was indexed under the letter “R.” *Id.* at 976. The mortgage, however, used the hyphen and was indexed by the county clerk under the letter “L.” *Id.* Therefore, the title search did not pick up on

the mortgage as it was indexed under “L” and not “R.” *Id.* Again, this case is factually distinguishable from the case at bar.

In re Duffy-Irvine Associates, 39 B.R. 525 (Bankr. E.D.Pa. 1984), another case cited by Hinshaw and PHH, is easily distinguishable as the mortgage lien holder acknowledged the fact that the mortgage was never recorded. *Id.* at 527. The mortgage lien holder contended that her filing of a complaint in equity should have provided the bankruptcy trustee with constructive notice of her interest in the property. *Id.* at 530.

Compiano v. Jones, 269 N.W.2d 459 (Iowa 1978) is not only distinguishable, but favors MidCountry. In that case, property owners sought to exonerate their property from restrictive covenants placed on the land approximately 30 years before the action as well as defendant’s filing an affidavit seeking to extend the use restrictions. *Id.* at 460-61. The affidavit in question, by statute, should have been indexed in the “claimant’s book,” however, the recorder indexed it in a different place, the “miscellaneous index.” Therefore, anyone searching would not necessarily check the miscellaneous index as Iowa law allows a searcher to rely on the claimant’s book. *Id.* at 461.

Minnesota law is notably different as it charges searchers with notice of **both** the grantor-grantee index and the tract index. *See Latourell*, 160 N.W. at 261 (“The record book and the index book are not to be considered as detached and independent books, but related and connected ones, and a party ... is, where the index makes the requisite reference, affected with notice of any facts which either book contains with respect to the title of his proposed grantor.” A purchaser “is presumed to have examined the whole record, and he is charged with such knowledge as the proper index entries afford, as well

as with notice of the facts derived from the transcript of the deed itself”).

Finally, Hinshaw and PHH cite *Thorp v. Merrill*, 21 Minn. 336 (1875) for the proposition that the MidCountry Mortgage was “so mis-recorded as to be, in effect, not recorded at all.” *See* Resp. Brief, p. 9. The Court’s basis for making that statement was that the mortgage in that case contained an erroneous legal description; such that, when a person searching the record actually viewed the mortgage, they would not be charged with notice that the mortgage encumbered the property at issue. *Id.* Again, we are reminded with the fact that Ms. Javens never searched the Scott County Grantor/Grantee Index and never viewed the actual MidCountry Mortgage, which contained the correct legal description of Parcel 3.

Most of the cases cited by Hinshaw and PHH are from other jurisdictions, with no precedential value. When those cases, however, are read in their entirety and we look beyond the headnotes, they either do not stand for the proposition’s asserted by Hinshaw and PHH; or, actually favor MidCountry’s position.

Not one of the cases, however, addresses, or is contrary to, the law in Minnesota charging a person searching the record with knowledge of (i) the grantor/grantee index, (ii) the tract index and (iii) the contents of the mortgage itself.

II. A FULL SEARCH OF THE RECORD WOULD HAVE LEAD TO THE DISCOVERY OF THE MIDCOUNTRY MORTGAGE ENCUMBERING PARCEL 3.

Hinshaw and PHH contend MidCountry was in the best position to correct the tract indexing error by the Scott County Recorder’s Office; however, that argument is not grounded in Minnesota law and it is an attempt to shirk the responsibility Ms. Javens had

when she was conducting her search.

To be clear, Ms. Javens' searches prior to Hinshaw and PHH acquiring their interests in Parcel 3 were done by reviewing electronic summaries of the Scott County Tract Index. To quote a case relied on by Hinshaw and PHH, Ms. Javens should have "reviewed the [MidCountry Mortgage] * * * to have effectively searched the chain of title." *See Hojnoski*, at 290.

Hinshaw and PHH assert that a ruling in MidCountry's favor would "force abstractors to *assume* that the indexes contain errors and to examine every document on file in the county to determine whether one might contain the legal description in question and have been misindexed." Resp. Brief, p. 17. This assertion, however, ignores the crucial facts of this case.

Ruling in MidCountry's favor would simply reinforce Minnesota law requiring abstractors to be responsible for the information contained in both indices. Ms. Javens did not need to search every document in Scott County to determine that the MidCountry Mortgage encumbered Parcel 3. She checked the Scott County Tract Index and found nothing. Had she checked the Grantor/Grantee Index under "Krueger," she would have discovered less than 20 documents and would have noted a mortgage (the MidCountry Mortgage). She could have selected that mortgage and rather than relying solely on the summary by Scott County, could have actually viewed the MidCountry Mortgage and would have discovered the legal description for Parcel 3.

Abstractors in Minnesota likely assume the same risk as Ms. Javens – relying solely on a tract index and summaries, while faster, does not vitiate the requirements of

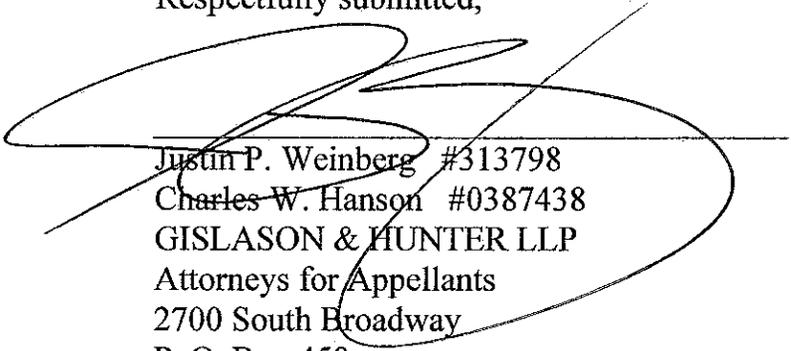
Minnesota law when searching the record.

CONCLUSION

For all of the reasons set forth above, and in its initial Brief, MidCountry Bank respectfully requests that this Court reverse the judgment of the district court and remand for entry of judgment in favor of MidCountry Bank, in an amount to be determined, and a decree of foreclosure of the Mortgage against Parcel 1, Parcel 2 and Parcel 3, to include the interests of Hinshaw and PHH. Alternatively, this Court should reverse and remand for trial on the merits.

Dated this 27th day of June, 2008.

Respectfully submitted,

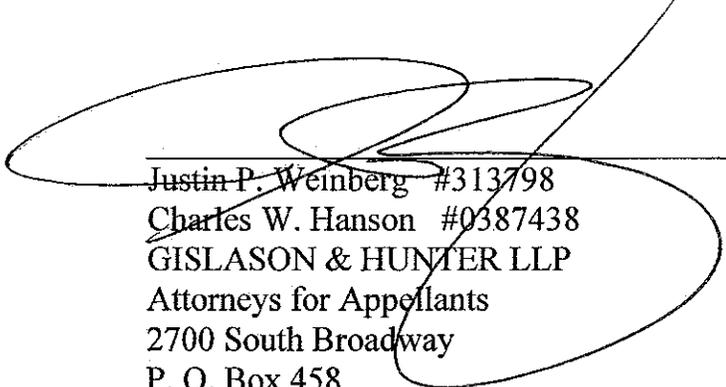


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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Minn. R. App. Pro. 132.01, subds. 1 and 3, contains 2,071 words and was prepared using Microsoft Word 2003.

Dated this 27th day of June, 2008.



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