

NO. A10-1672

State of Minnesota
In Court of Appeals

NC Properties, LLC,

Appellant,

vs.

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

Respondents,

and

Eric Lind and April Lind,

Third Party Plaintiffs,

v.

Thomas Buslee and Tradition Capital Bank,

Third Party Defendants.

BRIEF AND APPENDIX OF RESPONDENTS ERIC LIND AND APRIL LIND

DONOHUE McKENNEY
HENDRIKSON & BERGQUIST, LTD.
Chad McKenney, Esq. (#212039)
Brad Hendrikson, Esq. (#282352)
11222 – 86th Avenue North
Maple Grove, MN 55369
(763) 201-1450

*Attorneys for Appellant NC Properties, LLC,
and Third Party Defendants Thomas Buslee
and Tradition Capital Bank*

BEISEL & DUNLEVY, P.A.
Michael E. Kreun, Esq. (#0311650)
282 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 436-4343

Attorneys for Respondent ING Bank, F.S.B.

MACKALL, CROUNSE & MOORE, PLC
Matthew A. Anderson, Esq. (#284257)
Patrick B. Steinhoff, Esq. (#0340352)
1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
(612) 305-1400

Attorneys for Respondent Eric and April Lind

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE LEGAL ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
I. The Property	3
II. The Purchase Agreement, Loan Agreement, Promissory Note and Mortgage	3
III. The Parties' Performance of the Terms Set Forth in the Purchase Agreement, Loan Agreement, Promissory Note and Mortgage.....	6
IV. The Indebtedness Alleged by Appellant.....	6
V. Appellant's Cancellation of the Purchase Agreement and Recovery of the Property	7
LEGAL ARGUMENT	8
I. Standard of Review	9
II. The Linds Did Not Give, and Could not Have Given, the Mortgage as a Down Payment for the Purchase of the Property.....	10
A. The Mortgage Cannot Have Been a Down Payment.....	10
B. The Transaction Documents are Unambiguous and Plainly State that the Mortgage is Security for Construction Loan Advances, Not Security for a Down Payment.....	11
III. Appellant Has Elected Its Remedy and Cannot Enforce the Mortgage and Promissory Note Now.....	14
IV. Appellant Never Advanced Any Loan Proceeds to the Linds.....	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Art Goebel, Inc. v. North Suburban Agencies</i> , 567 N.W.2d 511 (Minn. 1997)	9, 13
<i>Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky</i> , 674 N.W.2d 176 (Minn. 2004)	1, 13
<i>Denelsbeck v. Wells Fargo and Co.</i> , 666 N.W.2d 339 (Minn. 2003)	13
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997).....	9
<i>Dyrdal v. Golden Nuggets, Inc.</i> , 689 N.W.2d 779 (Minn. 2004).....	9, 18
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993).....	9
<i>Jackson v. Mortgage Electronic Registration Systems, Inc.</i> , 770 N.W.2d 487 (Minn. 2009)...	1, 11
<i>Lamb Plumbing and Heating Co. v. Kraus-Anderson of Minneapolis, Inc.</i> 296 N.W. 2d 859 (Minn. 1980).....	13
<i>Moorhead Investment Co. v. Carlson</i> , 177 Minn. 174, 224 N.W. 842 (1929).....	16
<i>Neuman v. Demmer</i> , 414 N.W.2d 240 (Minn. Ct. App. 1987).....	1, 16
<i>Northwestern State Bank v. Foss</i> , 197 N.W.2d 662 (Minn. 1972).....	17
<i>Novus Equities Corp. v. Em-Ty Partnership</i> , 381 N.W.2d 426 (Minn. 1986)	1, 14, 16
<i>Rudnitski v. Seely</i> , 452 N.W.2d 664 (Minn. 1990).....	17
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990).....	9
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988)	12
<i>Warren v. Ward</i> , 91 Minn. 254, 97 N.W. 886 (1904)	16
<i>Wayzata Enterprises, Inc. v. Herman</i> , 268 Minn. 117, 128 N.W.2d 156 (1964).....	16

Statutes

Minn. Stat. § 513.05	1, 13
Minn. Stat. § 559.21	1, 7, 16

STATEMENT OF THE LEGAL ISSUES

1. Did the district court err in refusing to consider extrinsic evidence regarding the interpretation of the written documents comprising the subject transaction because those documents were unambiguous?

The district court concluded that the written documents comprising the subject transaction were unambiguous and that the subject mortgage and promissory note were plainly not intended as a down payment for the purchase of the subject real property.

Most apposite cases, statutes and rules: *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009); *Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176 (Minn. 2004); and Minn. Stat. § 513.05.

2. Is Appellant precluded from obtaining judgment against the Linds for the remaining purchase price of the subject real property because it elected its remedy by canceling the subject purchase agreement and recovering possession of the subject real property?

The district court concluded that Appellant's cancelation of the subject purchase agreement precluded it from obtaining judgment against the Linds.

Most apposite cases, statutes and rules: *Novus Equities Corp. v. Em-Ty Partnership*, 381 N.W.2d 426 (Minn. 1986); *Neuman v. Demmer*, 414 N.W.2d 240, 243 (Minn. Ct. App. 1987); Minn. Stat. § 559.21.

STATEMENT OF THE CASE

Appellant, N.C. Properties, LLC (“Appellant”) commenced an action against Respondents Eric and April Lind (together, the “Linds”) seeking, among other things, to foreclose a mortgage encumbering the Linds’ home and to obtain a money judgment against the Linds for an alleged breach of a purchase agreement, loan agreement and promissory note signed by the Linds in connection with a real property transaction between the Linds and Appellant. Appellant also asserted claims against the Linds for misrepresentation, consumer fraud and civil conspiracy.

The Linds moved for partial summary judgment seeking dismissal of Appellant’s foreclosure and breach of contract claims. By order dated April 15, 2010, the Hennepin County District Court, the Honorable Judge Mary S. DuFresne presiding, granted the Linds’ motion and ordered that partial judgment be entered in favor of the Linds and against Appellant. Judgment was entered on April 21, 2010. By order dated July 22, 2010, the District Court granted the motion of Respondent ING Bank, F.S.B (“ING Bank”) for summary judgment that the mortgage given to Appellant alleged to encumber the Linds’ residence was not enforceable. The parties subsequently agreed to dismiss the remaining claims and stipulate that the District Court’s orders granting summary judgment comprised the final judgment of the District Court. Final judgment was entered on July 26, 2010 and amended August 31, 2010.

STATEMENT OF FACTS

I. THE PROPERTY.

This matter relates to real property located at 3560 Kingspoint Road in the City of Minnetrista and legally described as Tracts D, E and F, Registered Land Survey No. 152, Hennepin County Minnesota (the "Property"). (Lind Aff., ¶ 2, App. p. 94)¹ At the time of the transaction described below, the Property was occupied by a partially completed single-family home. (Lind Aff., ¶ 3, App. p. 95)

II. THE PURCHASE AGREEMENT, LOAN AGREEMENT, PROMISSORY NOTE AND MORTGAGE.

The Linds agreed to purchase the Property from Appellant. The Linds also agreed to borrow money from Appellant for the purpose of financing the purchase of the Property and that this loan would be secured, in part, by a mortgage on the Linds' residence in the City of Maple Grove. The terms of these agreements are set forth in four separate documents: a purchase agreement; a loan agreement; a promissory note; and a mortgage.

The Linds agreed to purchase the Property pursuant to a written purchase agreement (the "Purchase Agreement") dated December 18, 2007. (App. pp. 97-101) As set forth in the Purchase Agreement, the purchase price for the Property was to be as follows:

- 1) A \$10,000.00 cash down payment;
- 2) An installment payment of \$1,411,00.00; and

¹ All references to the appendix of Appellant's brief herein will be noted as "App." All references to the appendix of this brief will be noted as "RA."

3) Such funds as were necessary to complete construction of the Project on the Property.

(Purchase Agreement, ¶ 3, App. p. 97)

The Purchase Agreement provides that the Linds were to close on the contract by paying all amounts due within one year of substantial completion of construction of the house on the Property, but no later than April 13, 2009. (Purchase Agreement, ¶ 4, App. p. 97) Upon the Linds' full performance of their obligations under the Purchase Agreement, the Purchase Agreement obliged Appellant to convey the Property by warranty deed to the Linds. (Purchase Agreement, ¶ 5, App. p. 98)

To finance the purchase of the Property and the completion of the construction of the unfinished home on the Property, the Linds agreed to borrow money from Appellant pursuant to a loan agreement (the "Loan Agreement") dated December 18, 2007. (App. pp. 102-119) The loan was to be in the maximum amount of \$2,650,000.00 (which amount was to include both principal and an interest reserve). (Loan Agreement, § 1.01, App. p. 103) The Loan Agreement did not provide that the loan funds were to be immediately advanced, but rather provided that the Linds would submit "draw requests" for funds "from time to time" as needed. (Loan Agreement, §§ 1.01, 7.01, App. pp. 103, 110). The Loan Agreement further provided that loan funds would not be advanced without the draw requests first being approved by Appellant (which approval was subject to, among other things, the provision of mechanic's lien waivers and sworn construction statements from parties receiving payment for work on the Property). (Loan Agreement, § 7.01, App. p. 110) In particular, the Loan Agreement states that requests for

disbursement of loan proceeds are to be made by the borrowers (i.e. the Linds) in a particular form proscribed by the Loan Agreement and in accordance with a “Loan Disbursing Agreement” with a “Disbursing Agent.” (Id.)

In connection with the Loan Agreement, the Linds gave a promissory note (the “Promissory Note”) to Appellant. (App. pp. 120-122) The Promissory Note was also dated December 18, 2007 and was in the principal amount of \$2,650,000.00, the maximum amount of the loan provided by the Loan Agreement. (Promissory Note, ¶ 1, App. p. 120; Loan Agreement, § 1.01, App. p. 103) As security for advances to be made pursuant to the Loan Agreement and the Promissory Note, the Linds also gave Appellant a mortgage (the “Mortgage”) dated December 18, 2007 encumbering the Linds’ homestead located at 8635 Glacier Lane North, Maple Grove, Minnesota and legally described as Lot 4, Block 4, Rice Lake 2nd Addition, Hennepin County, Minnesota (the “Maple Grove Property”). (App. pp.123-128) By its own terms, the Mortgage expressly secures “payment of the Note (defined below)² for construction advances up to an amount of \$365,000.³” (Mortgage, App. p. 123) The Loan Agreement itself states that the Mortgage is security for advances made pursuant to the Loan Agreement. (Loan Agreement, § 1.03, App. p. 103)

² The Mortgage defines the term Note as, collectively, the Promissory Note and the Loan Agreement. (Id., p. 1)

³ Appellant’s Brief states that the Mortgage “secured the \$1,411,000 initial payment and all the loan agreement and purchase agreement providing that were incorporated by reference fully into the mortgage.” (Appellant’s Brief, p. 9) This differs dramatically from what the Mortgage actually states.

III. THE PARTIES' PERFORMANCE OF THE TERMS SET FORTH IN THE PURCHASE AGREEMENT, LOAN AGREEMENT, PROMISSORY NOTE AND MORTGAGE.

The Linds paid Appellant cash in the total amount of \$35,000 (the \$10,000 down payment required by the Purchase Agreement plus a \$25,000 "broker fee" required to be paid to Plaintiff under the Loan Agreement). (Lind Aff., ¶ 13, App. p. 96) Although both the Loan Agreement and the Promissory Note provide for the advance of loan proceeds from Appellant to the Linds, Appellant never actually advanced any loan proceeds to the Linds. (Lind Aff., ¶ 12, App. pp. 95-96)

IV. THE INDEBTEDNESS ALLEGED BY APPELLANT.

Appellant alleged in the Complaint that the Linds are liable to Appellant for \$2,655,919.00, which is slightly over the full maximum amount of the loan as provided by the Loan Agreement and the Promissory Note. (Complaint, ¶ 23) As noted above, Appellant never actually advanced any loan proceeds to the Linds. Indeed, Appellant has never actually even alleged (either in its brief to this Court, in its Memorandum of Law opposing the Linds' motion submitted to the District Court, or in the Affidavit of Thomas Buslee also submitted in opposition to the Linds' motion) that Appellant actually advanced any loan proceeds to the Linds.⁴

⁴ If the Court carefully reads text of Appellants' brief to this Court; the Memorandum of Law submitted by Appellant to the District Court; the affidavits submitted by Appellant in connection with the Memorandum of Law; and the Complaint, Appellant never actually alleges that it advanced loan funds to the Linds. Appellant simply states that the Linds agreed to repay loan advances up to a maximum amount of \$2,650,000 and jumps to the conclusion that the Linds are liable for this amount. Appellant skips the intermediate step of alleging that Appellant actually advanced the loan funds as provided in the Loan Agreement and Promissory Note. The absence of any loan advances is

In response to the Linds' motion for partial summary judgment, Appellant suggested indirectly that it had advanced loan funds to the Linds by disbursing the loan funds directly to construction contractors contributing labor and materials to the improvement of the Property pursuant to "draw requests" submitted by the Linds. (Memorandum in Opposition to Motion for Partial Summary Judgment, p. 13, App. p. 13) However, the only evidence of these purported loan advances identified to the District Court by Appellant was copies of draw requests that were submitted to a "lender" identified as BankCherokee and signed by a "borrower" identified as Thomas Buslee, the Chief Manager of Appellant. (RA, pp. 28 – 33) However, Appellant never produced any evidence that it actually advanced any loan funds in connection with these draw requests.

V. APPELLANT'S CANCELLATION OF THE PURCHASE AGREEMENT AND RECOVERY OF THE PROPERTY.

By notice of cancellation dated July 28, 2008 (the "Notice of Cancellation"), Appellant notified the Linds that it was cancelling the Purchase Agreement. (Notice of Cancellation, App. pp. 129-131) The Linds did not cure the alleged default under the Purchase Agreement within the time permitted by Minn. Stat. § 559.21, subd. 4. (Lind Aff., ¶ 15, App. p. 96) Appellant then brought the underlying action in District Court seeking, among other things, to foreclose the Mortgage on the Maple Grove Property (i.e. the Linds' principal residence) as well as judgment against the Linds for more than \$2,650,000.

presumably why Appellant is attempting to characterize the Promissory Note as part of the purchase price paid for the Property and not as an obligation to repay loan indebtedness.

LEGAL ARGUMENT

Appellant is attempting to characterize the Mortgage (and presumably also the Promissory Note)⁵ as a down payment for the purchase of the Property. This characterization is so bizarrely inconsistent with the terms set forth in the Mortgage, Purchase Agreement, Loan Agreement and Promissory Note that it almost defies credulity. The component documents comprising the subject transaction are unambiguous, and none of them provide that either the Mortgage or the Promissory Note were given as a down payment for the purchase of the Property. Rather, the Promissory Note unambiguously states that it is a promise to repay future loan advances (which were never made), and the Mortgage unambiguously states that it was given as partial security for the Promissory Note. This Court can affirm the judgment of the District Court on this basis alone.

To the extent that it is even possible to interpret the Mortgage and the Promissory Note as payment of the purchase price for the Property, the District Court correctly concluded that Appellant cannot enforce those documents as such because Appellant elected its remedy by cancelling the Purchase Agreement. By cancelling the Purchase Agreement, Appellant elected to extinguish the Linds' equitable interest in the Property and restore to itself full fee ownership of the Property along with the house constructed on the Property. By doing so, Appellant is equitably barred from also obtaining a money judgment pursuant to the Promissory Note or from foreclosing the Mortgage. This would

⁵ As noted below, a mortgage is nothing more than security for a debt obligation. It therefore makes no sense to refer to a mortgage separate from its underlying debt obligation (which, in this case, is the Promissory Note).

constitute a more-than-double recovery (the Property as improved; a judgment equal to all of the money that was supposed to be used to purchase and improve the Property; and the Linds' homestead in Maple Grove). The District Court concluded that such a recovery would be unseemly and barred by Minnesota law. The Linds respectfully request that the Court should affirm that conclusion in its entirety.

I. STANDARD OF REVIEW.

On appeal from the granting of a motion for summary judgment, a Minnesota appellate court is to ask whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The Court is to “view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Evidence which merely creates a metaphysical doubt as to a factual issue but is not sufficiently probative to permit reasonable persons to draw different conclusions about an essential element of the claim does not create a genuine issue of material fact for trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). When there are no genuine issues of material fact, the Court is to review the district court's decision de novo to determine whether it erred in applying the law. *Art Goebel, Inc. v. North Suburban Agencies*, 567 N.W.2d 511, 515 (Minn. 1997). A “party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed later at trial, or metaphysical doubt about the facts.” *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

II. THE LINDS DID NOT GIVE, AND COULD NOT HAVE GIVEN, THE MORTGAGE AS A DOWN PAYMENT FOR THE PURCHASE OF THE PROPERTY.

Appellant's sole argument on appeal is that that it is entitled to foreclose the Mortgage on the Linds' homestead in Maple Grove because the Mortgage was given as a down payment for the purchase of the Property (and thus survived the cancellation of the Purchase Agreement). As the District Court correctly concluded, there is not a single shred of admissible evidence to support this contention. First, a mortgage by itself cannot be a down payment for the purchase of real property because a mortgage is nothing more than security for a debt obligation. Second, the plain language of all of the unambiguous transaction documents makes it clear that the Mortgage was security for future construction loan advances (which were never made), not as security for a down payment debt obligation.

A. The Mortgage Cannot Have Been a Down Payment.

Appellant argues that the Linds gave Appellant the Mortgage by itself as a down payment for the purchase of the Property. This is not possible. A mortgage cannot be a down payment. A mortgage is nothing more than security for a debt and, as such, is merely incidental to an underlying debt obligation or promissory note.⁶ *Jackson v.*

⁶ As a mortgage is only security for an underlying debt obligation, the Linds have always understood Appellant's argument to be that it was the Promissory Note secured by the Mortgage (not simply the Mortgage itself) that was a down payment for the purchase of the Property. This is also plainly how the District Court understood Appellant's argument. This bizarre characterization of the Promissory Note and Mortgage caused considerable confusion to the District Court, as it was not clear how the Promissory Note could be, at the same time, both part of the purchase price for the acquisition of the

Mortgage Electronic Registration Systems, Inc., 770 N.W.2d 487 (Minn. 2009) (stating that a “security instrument can have no separate or independent existence apart from the debt it secures”). Accordingly, a mortgage can be security for a promissory note or some other debt obligation given as a down payment. However, it cannot be a down payment itself.

B. The Transaction Documents are Unambiguous and Plainly State that the Mortgage is Security for Construction Loan Advances, Not Security for a Down Payment.

It is its brief to this Court, Appellant characterizes the Linds’ down payment obligation for the purchase of the Property as follows: The Linds promised to make a \$1,811,000⁷ down payment for the purchase of the Property; the Linds only paid \$35,000 of the promised amount; and the Mortgage is a promise to repay the remainder. This characterization bears no resemblance to the terms of the transaction that is actually described in the Purchase Agreement, Loan Agreement, Promissory Note and Mortgage. Appellant explains that this is because these documents are ambiguous and the District Court should have accepted the explanation of the terms of the subject transaction that is set forth in the affidavit of Thomas Buslee submitted in opposition to the Linds’ motion for partial summary judgment. In his affidavit, Mr. Buslee explains that the parties

Property and a promise to repay loan indebtedness (which is what the Promissory Note identifies itself to be).

⁷ The amount of the down payment to which Appellant claims to be entitled has varied. In the Complaint, Plaintiff alleges the required down payment to have been \$400,000. (Complaint, ¶ 3) On appeal, for the first time, Appellant argues that the \$1,411,000 initial installment provided by the Purchase Agreement was also part of the required down payment. It is not clear to the Linds whether the \$1,411,000 includes the \$400,000, or is in addition to the \$400,000. The Linds will assume in this brief that Appellant is claiming that a \$1,811,000 down payment was required.

agreed to a \$400,000 down payment even though there is no mention of such a thing in the Purchase Agreement, Loan Agreement, Promissory Note or the Mortgage.⁸

As a preliminary matter, the Linds note that Appellant never actually made an argument to the District Court that these documents were in any way ambiguous. Rather, Appellant simply asserted an interpretation of these documents (supported by an affidavit from Appellant's chief manager) which bore almost no resemblance to the words stated in the documents themselves. In the Memorandum accompanying the Order granting the Linds' motion for partial summary judgment, the District Court rejected Appellant's interpretation; observed that the documents were not ambiguous; and stated that it would not consider extrinsic evidence (Memorandum dated April 15, 2010, p. 13). However, this observation by the District Court was not in response to any argument asserted by Appellants. A party may not raise matter on appeal that it did not argue to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, this Court should not allow Appellant to raise it now.

To the extent the Court even considers Appellant's argument that the District Court should have looked to Mr. Buslee's affidavit to ascertain the meaning of the subject documents, the Linds note that this affidavit does not constitute admissible evidence and that the Court should ignore it (as the District Court correctly did). Mr. Buslee's affidavit recounting alleged verbal agreements of the parties obviously cannot

⁸ Not even Mr. Buslee's affidavit provided to the District Court alleges that the \$1,411,000 "first payment" due under the Purchase Agreement is also part of the down payment, as Appellant now argues. There appears to be no basis whatsoever in the factual record for this allegation.

be, by itself, admissible evidence of the agreement of the parties because of the statute of frauds. See Minn. Stat. § 513.05 (2007) (stating that agreements for the conveyance of land are void unless the consideration for the conveyance is stated in writing). Accordingly, Mr. Buslee's statements would only be admissible as parol evidence of the meaning of the Purchase Agreement, Promissory Note, Loan Agreement and Mortgage if the District Court had found these documents to be ambiguous. The District Court correctly concluded that these documents were not ambiguous and therefore concluded that neither the Promissory Note nor the Mortgage were given as a down payment.

Minnesota courts have long held that the terms of a contract must be given their plain and ordinary meaning and that the construction of a contract is a matter for the Court. *Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004), citing *Denelsbeck v. Wells Fargo and Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003). Consideration of facts outside the four corners of the contract may therefore only occur if the contract language is ambiguous, and a contract is ambiguous if based on its language it is reasonably susceptible to more than one interpretation. *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W. 2d 511, 515 (Minn. 1997), citing *Lamb Plumbing and Heating Co. v. Kraus-Anderson of Minneapolis, Inc.* 296 N.W. 2d 859, 862 (Minn. 1980).

Here, the transaction documents at issue cannot reasonably bear the interpretation proposed by Appellant. First, the Purchase Agreement does not provide for a down payment of \$1,811,000. Rather, it expressly provides for a down payment of \$10,000 (which the Linds paid and are not trying to recover). Second, the Promissory Note does not say a single word about promising to pay the unpaid balance of a down payment.

Rather, it plainly states that it is a promise to repay future loan advances up to a maximum amount of \$2,650,000. Finally, the Mortgage does not say a single word about securing the unpaid balance of a down payment.⁹ Rather, the Mortgage plainly states that it secures future loan advances made to the Linds pursuant to the Loan Agreement and Promissory Note up to a maximum amount of \$365,000.

There is a presumption in Minnesota law that a debt obligation is not a promise to make a down payment unless it plainly identifies itself as such. *Novus Equities Corp. v. Em-Ty Partnership*, 381 N.W.2d 426, 429 (Minn. 1986). Accordingly, both the Promissory Note and the Mortgage are presumed not to be a down payment unless they are plainly identified itself as such, which they are not. Accordingly, the Court should reject Appellant's argument that the Promissory Note and Mortgage were given as part of the down payment for the purchase of the Property.

III. APPELLANT HAS ELECTED ITS REMEDY AND CANNOT ENFORCE THE MORTGAGE AND PROMISSORY NOTE NOW.

As noted above, neither the Promissory Note nor the Mortgage was given as part of a down payment for the purchase price of the Property. This is apparent from the plain language of those documents, which the District Court correctly concluded to be unambiguous. The Promissory Note was given as a promise to repay future loan advances (which were never made), and the Mortgage was given as security for the

⁹ Indeed, the Mortgage makes no reference to the purchase of the Property at all. It is very difficult to interpret a document to be a down payment for the purchase of real property when that document does not even make a single reference to the purchase of real property (much less a reference to a "down payment").

Promissory Note. Appellant is not arguing on appeal that it ever made loan advances to the Linds that the Linds failed to repay. Rather, Appellant's argument on appeal is limited to the argument that the Mortgage was given as part of the down payment for the purchase of the Property. As it plainly was not, this Court can end its inquiry now and affirm the judgment of the District Court.¹⁰

To the extent that the Promissory Note and Mortgage were given as an installment payment for the purchase of the Property, the District Court correctly concluded that Appellant cannot attempt to enforce these documents now because it has elected its remedy by cancelling the Purchase Agreement and extinguishing the Linds' interest in the Property. It has long been the law in Minnesota that one cannot enforce a contract to purchase real property and simultaneously recover a money judgment for the unpaid purchase price. As the Minnesota Supreme Court held more than a century ago:

One cannot have the specific performance of [a] contract and its rescission. This is but the application of the very hackneyed truism that "one cannot have his cake and eat it."

[I]t seems palpably inequitable and unjust that the vendor could have her land, what has been paid upon it, and likewise enforce further payments.

¹⁰ Appellant makes much out of the language in the Promissory Note that states that it survives the cancellation of the Purchase Agreement. (Promissory Note, p. 4, App. p. 122) The District Court correctly concluded that parties cannot contract for a double recovery in abrogation of the election-of-remedies doctrine. (Memorandum dated April 15, 2010) However, it is not necessary for this Court to decide this question because the Promissory Note is a promise to repay future loan advances. It was not given as payment of the purchase price for the Property. It is therefore irrelevant whether it survives the cancellation of the Purchase Agreement because there were no loan advances. Accordingly, the Promissory Note could not be enforced even if it did survive the cancellation of the Purchase Agreement.

Warren v. Ward, 91 Minn. 254, 258, 97 N.W. 886, 887 (1904). In this regard, the Minnesota Court of Appeals has observed that the forfeiture rule of the statutory cancellation process is “harsh enough, without allowing vendors to keep the land and collect unpaid installments as well.” *Neuman v. Demmer*, 414 N.W.2d 240, 243 (Minn. Ct. App. 1987), citing *Warren*, 91 Minn. at 258, 97 N.W. at 887; see also *Wayzata Enterprises, Inc. v. Herman*, 268 Minn. 117, 119-21, 128 N.W.2d 156, 158-59 (1964); and *Moorhead Investment Co. v. Carlson*, 177 Minn. 174, 176, 224 N.W. 842, 843 (1929).

Here, Appellant cancelled the Purchase Agreement using the expedited statutory procedure established by Minn. Stat. § 559.21. It is well-established law in Minnesota that, following the statutory cancellation of a contract, the vendor who cancelled the contract may not then also enforce a promissory note given as an installment toward the purchase price. *Novus Equities Corp. v. Em-Ty Partnership*, 381 N.W.2d 426, 429-30 (Minn. 1986). Rather, the vendor who cancelled the contract may only enforce promissory notes given as a down payment towards the purchase of the subject property. *Id.* As noted above, the Promissory Note and the Mortgage were not given as a down payment for the purchase of the Property as Appellant alleges. Accordingly, having already exercised the drastic remedy of cancelling the Purchase Agreement and extinguishing the Linds’ equitable interest in the Property, Appellant cannot now also enforce the Mortgage or the Promissory Note to the extent these documents were given as part of the purchase price of the Property.

The election of remedies doctrine applies when an action was pursued to a determinative conclusion, the [vendee] procured advantage from his or her actions, or if the [vendor] was subjected to injury.” *Rudnitski v. Seely*, 452 N.W.2d 664, 666 (Minn. 1990). “The purpose of the election-of-remedies doctrine is not to prevent recourse to a potential remedy but to prevent double recovery for a single wrong.” *Northwestern State Bank v. Foss*, 197 N.w.2d 662, 666 (Minn. 1972).

The Linds note the extraordinary nature of the relief sought by Appellant: Appellant is attempting to obtain judgment against the Linds for the full purchase price of the Property. Appellant is doing so notwithstanding the fact that it has already restored itself to full fee ownership of the Property (the purchase of which the Linds were supposed to have financed with loan advances from Appellant) by extinguishing the Linds’ equitable purchase-agreement-vendee’s interest in the Property along with the completed house situated on the Property (the construction of which the Linds were supposed to complete using loan advances from Appellant). Appellant is also attempting acquire the Maple Grove Property (the Linds’ principal residence) through foreclosure of the Mortgage.

It is obviously and grossly unfair for Appellant to recover the Property, the house built on the Property, the full purchase price of the Property, and the Linds’ homestead in Maple Grove. Appellant has recovered the Property along with all of the improvements thereto. The District Court determined that recovery to be sufficient, and this Court should affirm that determination in its entirety. For this reason, the Court should affirm the judgment entered by the District Court.

IV. APPELLANT NEVER ADVANCED ANY LOAN PROCEEDS TO THE LINDS.

As set forth above, the Promissory Note was not given as part of the down payment for the purchase of the Property. It was given as a promise to repay the \$2,650,000 in loan funds that were supposed to have been advanced by Appellant to the Linds pursuant to the Loan Agreement. However, Appellant never advanced a single penny of loan funds to the Linds; there are no facts in the record that even suggest that Appellant advanced a single penny of loan funds to the Linds; and Appellant does not even claim that it advanced a single penny of loan funds to the Linds. These conclusions are implicit in the District Court's Order granting the Linds' motion for partial summary judgment and the accompanying Memorandum.¹¹

To the extent that Appellant is even arguing that it is entitled to a judgment against the Linds for the Linds' failure to repay loan indebtedness, Appellant did not produce a single shred of evidence to the District Court that it actually advanced a single penny of the \$2,650,000 of the loan proceeds for which the Loan Agreement and Promissory Note provide. As noted above, a party cannot overcome a motion for summary judgment by attempting to manufacture disputed factual issues with "unverified and conclusory allegations." *Dyrdal*, 689 N.W.2d at 783. For this reason, the District Court did not err

¹¹ The Linds moved for summary judgment on the basis of the election of remedies doctrine and on the basis that Appellant had never advanced any loan funds to the Linds. In its Memorandum, the District Court focused primarily on the election of remedies issues. The Linds do not understand Appellant to be making an argument on appeal that it is entitled to a judgment for the Linds' failure to repay loan funds which the Linds never received from Appellant. However, it is not clear to the Linds exactly what Appellant is arguing on appeal, so the Linds will address this issue briefly anyway.

determining that there were no disputed issues of material fact regarding whether the Linds were liable for \$2,650,000 pursuant to the Promissory Note and that the Linds were entitled to judgment as a matter of law.

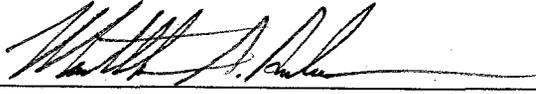
CONCLUSION

Based on the foregoing, the Linds respectfully ask the Court to affirm the District Court's judgment in its entirety.

Respectfully submitted,

MACKALL, CROUNSE & MOORE, PLC

Dated: December 23, 2010

By: 

Matthew A. Anderson (#284257)

Patrick B. Steinhoff (#340352)

1400 AT&T Tower

901 Marquette Avenue

Minneapolis, MN 55402

Tel: (612) 305-1400

Attorneys for Respondents Eric Lind and April Lind