

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,

Eric Lind and April Lind,

Third Party Plaintiffs,

v.

Thomas Buslee and Tradition Capital Bank,

Third Party Defendants.

BRIEF OF RESPONDENT ING BANK, F.S.B.

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STATEMENT OF THE ISSUES

I. Did the district court err by concluding that a mortgage securing a promissory note for future installments on a purchase agreement was not a down payment that survives statutory cancellation of the purchase agreement under Minnesota Statutes section 559.21?

A. HOW THE ISSUE WAS RAISED IN THE DISTRICT COURT

The issue was raised in the motion for partial summary judgment by Eric Lind and April Lind, dated January 15, 2010, heard by the district court on February 16, 2010, and decided by order for partial summary judgment dated April 15, 2010. [App. P. 132-147]

B. A CONCISE STATEMENT OF THE DISTRICT COURT'S RULING

"The documents are clear that the mortgage is security for future, not yet due installments on the contract, and since not-yet-due installments on the contract cannot be collected once the contract is cancelled, neither can the security for those not-yet-due installments be called in." [App. P. 144]

C. PRESERVATION OF APPEAL

Appeal of judgment from order granting summary judgment.

D. APPOSITE AUTHORITY

Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986)

Neuman v. Demmer, 414 N.W.2d 240 (Minn. Ct. App. 1987)

Andresen v. Simon, 171 Minn. 168, 213 N.W. 563 (1927)

Zirinsky v. Sheehan, 413 F.2d 481 (8th Cir. (Minn.) 1969)

II. Did the district court err by concluding that future installment payments due on a purchase agreement did not survive statutory cancellation of the purchase agreement under Minnesota Statutes section 559.21 despite a clause

in the purchase agreement that “all amounts owed” by the vendee would survive cancellation?

A. HOW THE ISSUE WAS RAISED IN THE DISTRICT COURT

The issue was raised in the motion for partial summary judgment by Eric and April Lind, dated January 15, 2010, heard by the district court on February 16, 2010, and decided by order for partial summary judgment dated April 15, 2010. [App. P. 132-147]

B. A CONCISE STATEMENT OF THE DISTRICT COURT’S RULING

When the vendor cancelled the purchase agreement, the vendor waived any rights under the terms of the purchase agreement including the right to pursue remedies after cancellation. A cause of action cannot be based on a purchase agreement that legally ceased existence once cancellation took effect. [App. P. 146]

C. PRESERVATION OF APPEAL

Appeal of judgment from order granting summary judgment.

D. APPOSITE AUTHORITY

Rudnitski v. Seely, 452 N.W.2d 664 (Minn. 1990)

Smith v. Dristig, 176 Minn. 601, 224 N.W. 157 (1929)

Des Moines Joint Stock Land Bank v. Wyffles, 185 Minn. 476, 241 N.W. 592 (1932)

III. Did the district court err by concluding that a mortgage securing a promissory note for future installment payments on a purchase agreement was no longer a valid lien after statutory cancellation of the purchase agreement?

A. HOW THE ISSUE WAS RAISED IN THE DISTRICT COURT

The issue was raised in the motion for partial summary judgment by ING Bank, F.S.B. dated May 7, 2010, heard by the court on June 7, 2010, and decided by order for

judgment on July 22, 2010, which was amended by order dated August 30, 2010. [App. P. 148-452]

B. A CONCISE STATEMENT OF THE DISTRICT COURT’S RULING

The mortgage securing future construction loan advances under a purchase agreement was extinguished when the purchase agreement was cancelled. [App. P. 148-452]

C. PRESERVATION OF APPEAL

Appeal of judgment from order granting summary judgment.

D. APPOSITE AUTHORITY

McManaman v. Hinchley, 82 Minn. 296, 84 N.W. 1018 (1901)

Johnson v. Howe, 176 Minn. 287, 223 N.W. 148 (1929)

STATEMENT OF THE CASE

This appeal is from the District Court, Fourth Judicial District, Hennepin County, the Honorable Mary S. DuFresne presiding. Appellant NC Properties, LLC (“NC Properties”) commenced an action in district court seeking, *inter alia*, to foreclose a mortgage on the residence of Respondents Eric and April Lind (the “Linds”). [Complaint] NC Properties named Respondent ING Bank, F.S.B. (“ING”) a defendant in the foreclosure action alleging that NC Properties’ mortgage was superior to ING’s mortgage on the Linds’ residence. *Id.* The Linds answered NC Properties’ complaint and challenged the validity of NC Properties’ mortgage on their residence. [Separate Answer to Complaint, and Counterclaim and Third Party Complaint of Eric Lind and April Lind] ING answered the complaint, counterclaimed, and brought a cross-claim

against the Linds. [Answer, Counterclaim and Cross-Claim of ING Bank, F.S.B.] ING denied NC Properties' mortgage priority claim and alleged in its counterclaim that NC Properties' mortgage on the Linds' residence was not a valid lien on the property. In the alternative, ING's counterclaim sought priority over NC Properties' mortgage based on the doctrine of equitable subrogation. ING's cross-claim against the Linds alleged failure to disclose an encumbrance, breach of warranties of title, money paid by mistake, and fraud based on the Linds' failure to disclose the existence of NC Properties' mortgage to ING. [Answer, Counterclaim and Cross-Claim of ING Bank, F.S.B.]

By order dated April 15, 2010, the district court granted the Linds' motion for partial summary judgment and dismissed Counts I and II of NC Properties' complaint with prejudice. [App. P. 132-147] The district court held that NC Properties' mortgage was security for future advances on the purchase of separate property; that NC Properties had cancelled the purchase agreement for the other property pursuant to Minnesota Statutes section 559.21; that the promissory note did not survive cancellation of the purchase agreement; and, therefore, NC Properties' mortgage did not survive the statutory cancellation of the purchase agreement. [App. P. 132-147] By order dated July 22, 2010, and amended on August 30, 2010, the district court granted ING's motion for partial summary judgment, dismissed Count III of the complaint with prejudice, granted summary judgment on Count I of ING's counterclaim and held that NC Properties' mortgage on the Linds' residence was no longer a valid mortgage. [App. P. 132-147] ING Bank voluntarily dismissed without prejudice its equitable subrogation claim (count II in its counterclaim) and also voluntarily dismissed without prejudice its cross-claim

against the Linds. [Stipulation dated May 24, 2010 and attached Order dated June 7, 2010] NC Properties now appeals the district court's judgment dismissing Counts I, II, and III of NC Properties' complaint and in favor of ING on Count I of its counterclaim. [Notice of Appeal]

STATEMENT OF FACTS

1. Eric Lind and April Lind (the "Linds") are owners of real property in Hennepin County, Minnesota described as: Lot 4, Block 4, Rice Lake 2nd Addition (the "Homestead Property").

2. On December 18, 2007, Plaintiff NC Properties, LLC ("NC Properties") entered into a purchase agreement (the "Purchase Agreement") to sell real property in Hennepin County to the Linds, legally described as: Tracts D, E, and F, Registered Land Survey No. 152 (the "Kings Point Property"). [App. P. 97-101]

3. The Linds intended to construct a house on the Kings Point Property and sell it for a profit. [App. P. 102-119]

4. The Purchase Agreement was an executory contract financed by NC Properties as the seller. The Purchase Agreement states the purchase price as follows:

- a. \$10,000 DOWN PAYMENT CASH;
- b. \$1,411,000 first payment due to Seller at signing of this Contract (by initial Advance under Loan Agreement);
- c. The total amount to complete construction on the Property according to the Plans and Specifications as referred to and approved in accordance with the Loan Agreement, consisting of all draws and additional

amounts, including interest and costs, owned by Buyer to Seller under the Loan Agreement, in addition to (b) above to complete said construction.

[App. P. 97]

5. The Linds entered a loan agreement with NC Properties and signed a line of credit promissory note in the maximum principal amount of \$2,650,000 (the "NC Note"). [App. P. 102-119 and 120-122] The loan proceeds from the line of credit were used to make the advances noted in the Purchase Agreement.

6. Payment of construction advances made under the NC Note was secured by a separate third mortgage on the Linds' Homestead Property dated December 18, 2007, limited to \$365,000 in a form provided by NC Properties and executed by the Linds. [App. P. 103-104, Section 1.03]

7. The mortgage securing the NC Note was recorded with the Hennepin County Registrar of Titles on December 27, 2007 as document number 4457382. (the "NC Mortgage") [Affidavit of Thomas Buslee, Exhibit 20 ¶ 10]

8. The NC Mortgage states, "This Mortgage shall secure payment of the Note (defined below) for construction advances up to an amount of \$365,000." [App. P. 123] The Note was defined below in the NC Mortgage as the NC Note and a loan agreement of even date (the "Loan Agreement") [App. P. 103]

9. The NC Mortgage was taken as security in the form of a third mortgage on the Homestead Property and specifically recites two existing superior mortgages on the

Homestead Property as permitted encumbrances, in the amounts of \$125,000 and \$480,000. [App. P. 128, and 102-119]

10. On April 22, 2008, the Linds refinanced the first and second mortgage on the Property with a mortgage to ING Bank of \$675,000.00, recorded with the Hennepin County Registrar of Titles on May 14, 2008 as document number 4497078. [Affidavit of Thomas Buslee, Exhibit 20 ¶ 11] Funds from the ING Mortgage paid off and satisfied the first and second mortgages on the Property.

11. The Linds ultimately defaulted on the NC Note and on July 28, 2008, NC Properties served a notice of cancellation of the Purchase Agreement for the Kings Point Property pursuant to Minnesota Statutes section 559.21. [App. P. 129-131]

12. The Linds did not cure the default and the Purchase Agreement was cancelled on August 28, 2008. [App. P. 129-131]

13. NC Properties took immediate possession of the Kings Point Property, finished construction of the dwelling, and continues to own and market the Kings Point Property for sale. [App. P. 33-34 ¶¶ 33-34]

14. On August 14, 2009, NC commenced this action seeking to foreclose the NC Mortgage against the Homestead Property and, in Count III, sought to declare the NC Mortgage's priority over the ING Mortgage. [Complaint]

STANDARD OF REVIEW

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, show that there is no genuine issue as to any material facts and that either party is entitled to judgment as matter of law. Minn. R. Civ.

P. 56.03. On an appeal from summary judgment, the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the trial court erred in its application of the law. *See Offerdahl v. University of Minnesota Hospitals and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988) (citing *Minneapolis, St.P. & S.Ste. M.R.R. v. St. Paul Mercury Indem. Co.*, 268 Minn. 390, 406, 129 N.W.2d 777, 788 (1964)). When reviewing a summary judgment, the reviewing court “must take a view of the evidence most favorable to the one against whom the motion was granted.” *Id.* (citing *Abdallah Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954)). However, the mere existence of the factual dispute by itself will not make summary judgment improper; the fact in dispute must be material. *See Pischke v. Kellen*, 384 N.W. 2d 201, 205 (Minn. App. 1986).

When a moving party has carried its burden under Rule 56, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See Carlisle v. City of Minneapolis*, 437 N.W. 2d 712, 715 (Minn. App. 1989). The party opposing the motion for summary judgment must demonstrate specific facts that establish the existence of triable issues. *See Rosvall v. Provost*, 155 N.W. 2d 900, 124 (Minn. 1968). The party opposing summary judgment cannot rely upon the mere averments or denials of their pleadings, but must present specific facts showing there is a genuine issue for trial. Minn. R. Civ. P. 56.05; *see also Eakman v. Brutger*, 285 N.W. 2d 95, 97 (Minn. 1979). If the non-moving party fails to provide the Court with specific facts indicating a general issue of material fact, summary judgment is proper. *See Hunt v. IBM Mid-*

America Employees Federal Credit Union, 384 N.W. 2d 853, 855 (Minn. 1986);

Erickson v. General United Life Insurance Company, 256 N.W. 2d 255, 258-59 (Minn. 1977).

ARGUMENT

- I. The district court correctly concluded that a mortgage securing a promissory note for future installments on a purchase agreement was not a down payment that survives cancellation of the purchase agreement under Minnesota Statutes section 559.21.**

Minnesota Statutes section 559.21 applies to all executory contracts for the sale of real estate where the vendor has the right to terminate the contract upon his own act for the default of the vendee. *See Graceville State Bank v. Hofschild*, 166 Minn. 58, 61, 206 N.W. 948, 949 (1926). In an executory land contract of this nature, the vendor holds the legal title to the real estate as security and the vendee holds the equitable title. *See Smith v. Dristig*, 176 Minn. 601, 602, 224 N.W.157, 157 (1929). The statutory method for cancellation is a drastic remedy, likened to a strict foreclosure. *See id.* There is no lawsuit, no sale, no right of redemption beyond the thirty days provided in the statute. Once the vendor elects statutory cancellation, the legal title remains with the vendor discharged of all equitable claims of the vendee. *See id.*, 176 Minn. at 602-03, 224 N.W. at 157.

When a vendor cancels an executory land sale contract by statutory notice, the vendor cannot recover the unpaid portion of purchase price. *See Andresen v. Simon*, 171 Minn. 168, 170, 213 N.W. 563, 564 (1927), *Smith v. Dristig*, 176 Minn. at 603, 224 N.W. at 157. Once statutory notice has been served and cancellation effected, all rights

between parties to a land contract are terminated. *See In re Butler*, 552 N.W.2d 226, 230 (Minn. 1996). The terminated rights include the vendor's right to seek specific performance or obtain judgment for installments due or to enforce an unsatisfied pre-cancellation judgment for unpaid installments. *See Zirinsky v. Sheehan*, 413 F.2d 481, 484 (8th Cir. (Minn.) 1969). The vendor on cancellation of land contract can retain payments made, but cannot recover unpaid installments. *See Neuman v. Demmer*, 414 N.W.2d 240, 243 (Minn. Ct. App. 1987). Cancellation of a contract for purchase of land discharges the liability of the purchasers on a note executed for balance due. *See Moorhead Inv. Co. v. Carlson*, 177 Minn. 174, 177, 224 N.W. 842, 843 (1929).

A vendor is not obligated to enforce the loan documents by electing statutory cancellation and, thereby terminating all other rights in the contract. The seller may secure a judgment for the full contract price and sell the property at a judicial sale to satisfy the judgment. *See Summit House Co. v. Gershman*, 502 N.W.2d 422, 424 (Minn. Ct. App. 1993). If NC Properties had elected this remedy, NC Properties would have retained its rights under the NC Note and NC Mortgage. Instead, NC Properties chose the expedient and inexpensive remedy of cancelling the contract non-judicially and taking immediate possession.

- A. A promissory note given by a vendee as part of the purchase price can survive a statutory cancellation only if it is given in lieu of cash as a down payment.**

The primary issue in this case is whether the NC Note can survive cancellation of the Purchase Agreement. Generally, unpaid installments on a note for the purchase price may not be recovered by the vendor after statutory cancellation. *See Neuman v. Demmer*,

414 N.W.2d at 243; *Carlson*, 177 Minn. at 177, 224 N.W. at 843. However, a promissory note that is given as a down payment in lieu of cash may survive a statutory cancellation. *Novus Equities Corp. v. EM-TY Partnership*, 381 N.W.2d 426, 429 (Minn. 1986). A down payment “is that part of a purchase price paid by the buyer initially to induce the seller to enter into the contract, thereby conveying equitable title and surrendering possession of the land.” *See id.* It is like an entry fee. *See id.* A promissory note can theoretically be categorized as “property” that can be transferred as a down payment, but as the *Novus Equities* Court noted, the difficulty of that concept is the inherently equivocal nature of a promissory note. *See id.* Therefore, the Supreme Court has come up with guidelines in determining whether a promissory note is considered as a payment in hand (down payment) or a payment deferred. *See id.*

If the parties intend for a promissory note to be a down payment, that intent must clearly appear. *See id.* Additionally, the *Novus Equities* Court held that (1) there is a presumption that a promissory note is not a down payment, and (2) the burden of proving a down payment is on the vendor. *See id.* at 429-30. The *Novus Equities* Court also considered the amount of the promissory note. *See id.* at 430. The *Novus Equities* Court noted that down payments are usually a relatively small percentage of the purchase price and that the greater the amount of the promissory note, the less likely it will be considered a down payment. *See id.* (holding that, at some point, “the amount or length of term of the promissory note might be such that recognize the note as a down payment would be a distortion and abuse of the contract for deed’s proper role.”)

B. NC Mortgage was not security for a promissory note given in lieu of cash as a down payment.

In this case, the purchase price for the Kings Point Property was the “total amount owed, including interest and costs, by Buyer to Seller pursuant to the Loan Agreement and Note and related documents.” [App. P. 97, ¶ 3] The purchase price was comprised of the following:

- a. \$10,000 DOWN PAYMENT CASH;
- b. \$1,411,000 first payment due to Seller at signing of this Contract (by initial Advance under Loan Agreement);
- c. The total amount to complete construction on the Property according to the Plans and Specifications as referred to and approved in accordance with the Loan Agreement, consisting of all draws and additional amounts, including interest and costs, owned by Buyer to Seller under the Loan Agreement, in addition to (b) above to complete said construction.

[App. P. 97]

The NC Note was for a maximum of \$2,650,000. [App. P. 120, ¶ 1] The NC Mortgage secured payment of the NC Note “for construction advances up to an amount of \$365,000.” [App. P. 123]

Thus, it is clear that \$10,000 cash constituted the down payment. However, NC Properties argues that part, or all, of the NC Note also constituted a down payment.

It is difficult to respond to NC Properties' argument relating to the down payment because NC Properties has not clearly stated what it alleges was the down payment. In Thomas Buslee's affidavit and in NC Properties' argument to the district court, NC Properties argued that the down payment was \$400,000. [App. P. 1-36] At the district court, NC Properties argued that the down payment was comprised of: \$35,000 cash (presumably represented by the \$10,000 cash down payment and the \$25,000 broker fee), plus a \$365,000 mortgage.¹ [App. P. 29-28 ¶¶ 17-18] In its appellate brief, NC Properties continues to argue that the down payment was \$400,000. [Appellant's Brief, pp. 2, 6, 7] However, NC Properties also, for the first time on appeal, argues that the down payment was really \$10,000 cash plus the \$1,411,000 first advance under the loan agreement. [Appellant's Brief, pp. 13, 16-17] In its new argument on appeal, NC Properties seemingly argues that the \$1,411,000 initial advance was really a down payment and that, since the initial advance was more than the maximum amount of the NC Mortgage, the NC Mortgage therefore secured the entire down payment. [Appellant's Brief, p. 13] ING will address both arguments in kind.

1. There is no admissible evidence of a \$400,000 down payment

Nothing in the documents states that the down payment was \$400,000. The only evidence in the record regarding a \$400,000 down payment is the affidavit of Thomas Buslee. Mr. Buslee alleges he had oral conversations with Eric Lind prior to the execution of the written documents that the down payment was supposed to be \$400,000.

¹ As noted in footnotes 5 and 6 of the Linds' responsive memorandum, a mortgage is security for a debt obligation and cannot, by itself, be part of a down payment. For the duration of this memorandum, ING Bank will assume that NC Properties is really arguing that the promissory note secured by the NC Mortgage was part of the down payment.

[App. P. 29-28 ¶¶ 17-18] The testimony submitted by Mr. Buslee through his affidavit is inadmissible under the parol evidence rule and the statute of frauds.

The parol evidence rule excludes evidence outside the written agreement, including oral discussions before or contemporaneous with the execution of the agreement, if the evidence contradicts the plain terms of the agreement. *See Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn.1982). The Purchase Agreement sets forth a down payment of \$10,000 cash and does not contain any reference to a \$400,000 down payment. [App. P. 97] The Purchase Agreement also contains an integration or merger clause indicating that the agreement can “be amended or modified only by written agreement signed by the parties hereto.” [App. P. 99 ¶ 15] Once a contract is considered integrated, parol evidence cannot be used to vary the terms of the contract. *See Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng’g Sales, Inc.*, 436 N.W.2d 121, 123 (Minn. Ct. App. 1989), *review denied* (Minn. Apr. 26, 1989). Evidence that while the signers agreed in writing to one thing, but meant another thing, is precisely the type of evidence intended to be excluded by the parol evidence rule. *See Klawitter v. Straumann*, 255 N.W.2d 407, 411 (Minn. 1977). The testimony contained in Mr. Buslee’s affidavit relating to the terms of the down payment bears no resemblance to the actual written documents. Thus, all of the testimony submitted in Mr. Buslee’s affidavit alleging that the down payment was \$400,000 despite the plain language in the Purchase Agreement stating the down payment was \$10,000, is barred by the parol evidence rule because the testimony contradicts the plain language of the integrated Purchase Agreement.

The statute of frauds also bars the affidavit testimony regarding an alleged oral agreement between Mr. Buslee and Eric Lind that the down payment was supposed to be \$400,000. Every contract for the sale of land shall be void unless the contract expressing the consideration is in writing and subscribed by the party whom the sale is to be made. *See* Minn. Stat. Ann. § 513.05. There is no written document or memoranda evidencing NC Properties' claim that the down payment was supposed to be \$400,000. For purposes of determining compliance with statute of frauds, parol evidence is admissible only to explain, but not to contradict or supply, a term of memorandum of a contract for sale of real estate. *See Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979). By relying on alleged oral communication evidencing that the down payment was really \$400,000, and not \$10,000 as stated in the Purchase Agreement, NC Properties is attempting to contradict or supply a term into the written Purchase Agreement. Thus, parol evidence is not admissible to gain compliance with the statute of frauds.

Moreover, even if the court were to find that the down payment was intended to be \$400,000, with \$365,000 of the down payment coming in the form of a promissory note, there is no evidence that the NC Mortgage secures such a down payment promissory note. Nowhere in the NC Mortgage does it state the mortgage secures a promissory note for a down payment, or even refers to a down payment. To the contrary, the NC Mortgage states that it secures *construction advances* up to \$365,000. [App. P. 123]

2. **The \$1,411,000 initial advance was not a down payment secured by the NC Mortgage.**

For the first time on appeal, NC Properties argues that the \$1,411,000 initial advance under the loan agreement, was in lieu of a cash down payment. As a preliminary matter, a party may not raise a matter on appeal that it did not argue to the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). To the extent this Court addresses NC Properties' new argument on the merits, there are numerous reasons the initial \$1,411,000 advance was not a down payment.

First, nowhere in the loan documents is the \$1,411,000 advance identified as a down payment. If the parties intend for a promissory note to be a down payment, that intent needs to clearly appear. *See Novus Equities*, 381 N.W.2d at 429. The fact that the \$1,411,000 initial advance under the loan is not labeled a down payment is particularly important because the \$10,000 cash provision directly above the initial advance provision in the Purchase Agreement is specifically labeled a "down payment." Since the Purchase Agreement specifically uses the term "down payment" for the \$10,000 cash provision, it is logical that a subsequent provision in the same section not labeled as a down payment was not intended to be a down payment.

Second, there is no evidence (even including the inadmissible testimony of Thomas Buslee) that the parties intended a \$1,411,000 down payment. Mr. Buslee testified in his affidavit that he typically requires a down payment of approximately 20% of the purchase price. [App. P. 27-28 ¶¶ 18-19] In this case, the maximum purchase price was \$2,650,000. Thus, assuming construction advances were maxed out, the alleged \$1,411,000 down payment would constitute over 53% of the entire purchase price. Moreover, Mr. Buslee testified that the parties agreed upon a \$400,000 down

payment and did not state in his affidavit that the parties contemplated a \$1,411,000 down payment.

Third, the NC Mortgage specifically states that it secures construction advances under the note up to \$365,000. [App. P. 123] So even if the \$1,411,000 initial advance is considered to be a down payment by this Court, that initial advance is not secured by the NC Mortgage.

Fourth, the plain language of the Purchase Agreement states that the \$1,411,000 advance is the first advance under the loan agreement, the first of multiple advances under the NC Note, and was required to be re-paid by the Linds in installments pursuant to paragraph 2 of the NC Note. [App. P. 120] “Minnesota courts have consistently held that if the installment payments have not been collected when the contract is cancelled, the vendor loses the right to collect them.” *Neuman v. Demmer*, 414 N.W.2d at 243.

Fifth, the \$1,411,000 amount is large enough that to recognize that advance as a down payment would be a distortion and abuse of the purpose of an executory contract for the purchase of land. *See Novus Equities*, 381 N.W.2d at 430 (recognizing that, “[a]t some point, it would seem, the amount or length of term of a promissory note might be such that to recognize the note as a downpayment would be a distortion and abuse of the contract for deed’s proper role.”) The *Novus Equities* Court did not set a bright line test as to what amount would be acceptable, but found that genuine issues of material fact existed as to whether a note for 16% of the purchase price could constitute the down payment. Given Mr. Buslee’s testimony that he typically requires down payments of approximately 20% of the purchase price and that the parties negotiated for

approximately a 15% down payment in this case, a down payment of more than 53% crosses the line and becomes a distortion and abuse of an executory purchase agreement's purpose. Furthermore, NC Properties relies on the clause in the Purchase Agreement which states that all amounts due under the loan agreement survive a cancellation as evidence the parties intended the \$1,411,000 advance to be a down payment. [App. P. 97] If the purchase price consists of the amounts due under the loan agreement, and all amounts due under the loan agreement survive a cancellation (according to the language in the Purchase Agreement), then by that logic, the entire purchase price must be considered a down payment. To find that 100% of an executory purchase agreement or contract for deed was the "down payment" would be absurd and certainly would be a distortion and abuse of the purchase agreement or contract for deed, both of which are executor contracts for the purchase of land.

3. The cases relied upon by NC Properties are distinguishable

NC Properties relies on *Novus Equities* and *Andresen* to argue that the NC Mortgage secured a promissory note for a down payment, or that genuine issues of material fact precluding summary judgment. But the facts of both cases are distinguishable. In *Novus Equities*, the contract clearly separated the promissory note and the unpaid balance of the purchase price, which was strong evidence the parties intended the promissory note to be for the down payment. See *Novus Equities*, 381 N.W.2d at 430. In this case, the NC Mortgage secures the entire NC Note, which includes all of the unpaid balance of the purchase price. There is no separation or distinction between a note that secures the down payment and a note that secures the unpaid balance of the

purchase price. The only indication of what portion of the NC Note is secured by the NC Mortgage is in the “Preliminary Statement of Facts” of the NC Mortgage, which states that the NC Mortgage secures payment of the NC Note “for construction advances up to an amount of \$365,000.” Construction advances are part of the unpaid purchase price, not the down payment. It would be nonsensical for future construction advances to be part of the down payment, and there is absolutely no evidence to support that argument.

Andreson is similarly distinguishable. In *Andreson*, the \$5,000 down payment note was separate from the \$11,000 note for the unpaid purchase balance. *See Andreson*, 171 Minn. at 169, 213 N.W. at 563. Moreover, in *Andreson*, there was no dispute that the \$5,000 note was a loan for the down payment. *See id.* In this case, NC Properties attempts to frame the argument that the parties had agreed upon a \$400,000 down payment, but the Linds could only come up with \$35,000, so the Lind’ agreed to give a \$365,000 mortgage for the rest of the down payment. [Appellant’s Brief p. 14] The fatal problem with that argument is that the only testimony regarding a \$400,000 down payment is from the affidavit of Mr. Buslee, which bears almost no resemblance to the actual loan documents. Nothing in the loan documents suggests that the parties had agreed upon a \$400,000 down payment or that the NC Mortgage secured a \$365,000 loan for the down payment. To the extent NC Properties argues that the \$1,411,000 advance was the loan for the down payment, there is no evidence to suggest the \$1,411,000 advance was a down payment *in lieu of cash*, which *Andreson* requires if the loan is to survive statutory cancellation. *See Andreson*, 171 Minn. at 171, 213 N.W. at 564.

NC Properties relies upon *National City Bank of Minneapolis v. Lundgren*, 435 N.W.2d 588 (Minn. Ct. App. 1989) for the argument that payment obligations remain after a statutory cancellation. [Appellant Brief, p. 21] However, *Lundgren* decided whether a separate guaranty may survive a *mortgage foreclosure* by advertisement. *Lundgren* did not involve a contract for deed or purchase agreement cancellation. Moreover, the guaranty being enforced in *Lundgren* was a separate agreement with different parties. In this case, NC Properties is attempting to enforce the same agreement that was cancelled between the same parties.

The two unpublished cases cited by NC Properties are also distinguishable. *Begin Development Co. v. KMW Management*, 1990 WL 72151 (Minn. Ct. App. 1990) is distinguishable. [App. P. 153-55] The promissory note involved in *Begin* did not involve unpaid installment payments. Rather, *Begin* involved a separate agreement relating to cancellation expenses. In this case, NC Properties is attempting to enforce unpaid installments relating to the NC Note which it cancelled. *Fredrick v. Pogin*, 1991 WL 46565 (Minn. Ct. App. 1991) is also distinguishable. [App. P. 156-58] The vendor in *Pogin* was attempting to enforce a separate guaranty after cancellation; it was not attempting to enforce unpaid installments under the note. The *Pogin* Court focused on the fact that the contract for deed and the guaranty were separate agreements involves different parties. In this case, the NC Properties is attempting to enforce the same agreement it cancelled involving the same parties.

C. No Ambiguity Exists in the Purchase Agreement as to the down payment.

For the first time on appeal, NC Properties argues that the Purchase Agreement and related loan documents that it drafted are ambiguous as to the down payment intended by the parties. A party may not raise a matter on appeal that it did not argue to the district court. *Thiele v. Stich*, 425 N.W.2d at 582. The district court nevertheless found that no ambiguity existed in the Purchase Agreement regarding the down payment or security for the down payment. [App. P. 144]

In construing a contract, the court must give all terms their plain, ordinary and popular meaning so as to determine the intent of the parties. *See Ostendorf v. Arrow Insurance Company*, 288 Minn. 491, 495, 182 N.W.2d 190, 192 (1970). The parties' intent should be determined, "not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which words and phrases are given a meaning in accordance with the obvious purpose of the...contract as a whole." *Cement, Sand & Gravel Co. v. Agricultural Ins. Co.*, 225 Minn. 211, 216, 30 N.W.2d 341, 345 (1947). Only if the contract is ambiguous will the court consider extrinsic evidence to aid in construction. *See Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn.1982). A contract is ambiguous if it is reasonably susceptible of more than one construction. *See Employers Liability Assurance Corporation v. Morse*, 261 Minn. 259, 264, 111 N.W.2d 620, 624 (1961). Whether or not a contract is ambiguous is a question of law. *See id.* at 263, 111 N.W.2d at 624.

The Purchase Agreement in this case is clear and unambiguous on its face. There was to be a \$10,000 down payment, a \$1,411,000 first advance under the installment loan, and then multiple subsequent advances under the installment loan based upon

construction draws. Both the initial advance and the subsequent construction advances were to be repaid under the same promissory note. The Purchase Agreement is not reasonably susceptible to more than one construction. NC Properties claims that the down payment was either \$400,000 or \$1,411,000. Neither position has any support on the face of the Purchase Agreement. Moreover, the NC Mortgage makes it clear that it secures construction advances made under the loan agreement. [App. P. 123] Nowhere does the NC Mortgage reference, mention, or imply that it secures a promissory note for the down payment. The loan documents read together, do not support NC Properties' theory that the down payment was something other than the \$10,000 cash payment listed in the Purchase Agreement.

NC Properties attempts to use testimony from Mr. Buslee's affidavit as the basis to form ambiguity in the contract. [Appellant's Brief. P 18] NC Properties argues that the agreement is ambiguous because Mr. Buslee and Mr. Lind allegedly discussed and agreed upon a cash down payment of \$35,000, not \$10,000. However, extrinsic evidence cannot be used *as the basis* to find ambiguity in the contract; it can only be used to help resolve ambiguity that exists in the written document itself. *See Current Tech Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn.1995) (holding that a contract is ambiguous if the language of the *written document, by itself*, is reasonably susceptible to more than one interpretation.) There is nothing ambiguous about the written document itself.

II. The district court correctly concluded that future installment payments due on a purchase agreement did not survive statutory cancellation of the purchase agreement under Minnesota Statutes section 559.21 despite a clause in the purchase agreement that “all amounts owed” by the vendee would survive cancellation.

The district court cited the election of remedies doctrine in holding that the Purchase Agreement, Loan Agreement, the NC note, and the NC Mortgage were all cancelled when NC Properties statutorily cancelled the Purchase Agreement, and that an action based upon any or all of those documents cannot be maintained, despite clauses in the loan documents stating that all amounts owed by the vendee survive cancellation.

[App. P. 146]

Among the options available to a contract for deed or purchase agreement vendor upon default of a vendee is cancellation of the contract pursuant to Minnesota Statutes section 559.21. Ordinarily, when a vendor of an executory contract for the sale of real estate exercises its option to cancel the contract under Minnesota Statutes section 559.21, “the vendor will be held to have elected a remedy and will thereafter be prevented from receiving double recovery by seeking damages for breach of contract.” *See Rudnitski v. Seely*, 452 N.W.2d 664, 666 (Minn. 1990) (citing *Wayzata Enters. v. Herman*, 268 Minn. 117, 119, 128 N.W.2d 156, 158 (1964)). “The election of remedies doctrine applies when an action was pursued to a determinative conclusion, the vendor procured advantage from his or her actions, or if the vendee was subjected to injury.” *Id.* (citing *First Nat'l Bank v. Flynn*, 190 Minn. 102, 106-07, 250 N.W. 806, 808 (1933); *Kosbau v. Dress*, 400 N.W.2d 106, 110 (Minn. Ct. App.1987); *Covington v. Pritchett*, 428 N.W.2d 121, 124 (Minn. Ct. App.1988)). “In short, one cannot ordinarily cancel a contract by the

statutory procedure and then recover benefits due under it.” *Id.* “The election of a statutory cancellation circumscribes the remedy and bars additional remedies relating to the breach of contract.” *Id.* at 667.

After statutory cancellation, the vendor may bring a cause of action that is not based upon or related to the breach of contract. *See id.* at 667. Therefore, the question is whether the instant action to enforce the promissory note and foreclose the NC Mortgage is “based upon or related to” the breach of the Purchase Agreement that resulted in the statutory cancellation. The answer to that question is yes. NC Properties is attempting to enforce the same note for unpaid installments that formed the basis for the statutory cancellation. [App. P. 129-131] The district court correctly held that by statutorily cancelling the contract, NC Properties waived its right to sue under the contract and is estopped from doing so, including the attempt to pursue contract remedies after cancellation. [App. P. 146]

The district court correctly held that a cause of action on the note for the unpaid balance of the purchase price could not be maintained after cancellation, despite the self-serving clauses in the Purchase Agreement and Loan Agreement drafted by NC Properties stating that “all amounts owed” by the vendee would survive a contract cancellation. Minnesota’s statutory cancellation is harsh enough without allowing vendors to keep the land and collect unpaid installments as well. *See Neuman v. Demmer*, 414 N.W.2d at 243 (citing *Warren v. Ward*, 91 Minn. 254, 258, 97 N.W. 886, 887 (1904) (“[O]ne cannot have the specific performance of the contract and its rescission. This is but the application of the very hackneyed truism that ‘one cannot have

his cake and eat it’)). “It is *fundamental* that unpaid installments cannot be collected by the vendor after cancellation of the contract.” *Des Moines Joint Stock Land Bank v. Wyffles*, 185 Minn. 476, 477, 241 N.W. 592, 593 (1932) (emphasis added).

The Minnesota Supreme Court has addressed the issue of parties attempting to “contract around” the fundamental purpose of the executory land contract in dicta, and strongly suggested that such contractual language would not be enforceable. *See Smith v. Dristig*, 176 Minn. 601, 603, 224 N.W. 157, 158 (1929) (The Court strongly suggested that an agreed-upon provision in a contract for deed designating unpaid installments in default as liquidated damages would not be enforced after a contract cancellation.) NC Properties has cited no authority, and ING Bank is aware of none, where a court enforced a contract provision that allowed a vendor to collect unpaid installments after cancellation.

Moreover, enforcing language in a contract that states liability for unpaid installments survives a statutory cancellation would distort and abuse the proper role of executory land contracts. *See Novus Equities*, 381 N.W.2d at 430. Allowing liability for unpaid installments to survive cancellation would turn the entire purchase price and all unpaid installments into a down payment. It would allow the vendor to summarily take the property without a court proceeding, and then sue the vendee for the entire amount due on the contract. It would allow the vendor to end up with not only the property, but the entire purchase price as well. Such an interpretation would make a mockery out of the contract for deed instrument. Therefore, the district court was correct in not enforcing the survival provision in the Purchase Agreement.

III. The district court correctly concluded that a mortgage securing a promissory note for future installments on a purchase agreement was no longer a valid lien after statutory cancellation of the purchase agreement.

The district court granted ING Bank's motion for partial summary judgment for a dismissal of Count III of NC Properties' complaint and granting Counts I and II of ING Bank's counterclaim.

A mortgage is but an incident of the debt, and can have no separate or independent existence as a contract. *See McManaman v. Hinchley*, 82 Minn. 296, 298, 84 N.W. 1018, 1018 (1901). "If the debt is paid or the instrument evidencing the same is taken up *or canceled*, the mortgage ceases to be a lien or of any validity." *Johnson v. Howe*, 176 Minn. 287, 291, 223 N.W. 148, 148 (1929) (emphasis added).

Because the cancellation of the Purchase Agreement discharged the liability of the vendee under the NC Note, and because the NC Mortgage secured the NC Note, the NC Mortgage was invalidated by virtue of the statutory cancellation. As such, the district court correctly concluded that the NC Mortgage was no longer a valid lien on the Linds' Homestead Property because the debt secured by the MC Mortgage was extinguished.

CONCLUSION

NC Properties decided to cancel the Purchase Agreement with the Linds. By doing so, NC Properties received the benefit of immediately and inexpensively taking possession of the Kings Point Property. NC Properties also lost its rights under the Purchase Agreement to sue for unpaid installments. NC Properties' realization after it cancelled the Purchase Agreement that it would not be made whole must not change the result in this case. NC Properties could have commenced a judicial action from the

outset, secured a judgment against the Linds for the entire amount due, and sold both properties at judicial sale in satisfaction of the judgment, preserving a deficiency judgment. NC Properties instead elected the expedited remedy of statutory cancellation. NC Properties pursued its statutory cancellation remedy to conclusion, and must now live with the consequences of its election.

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