

NO. A11-329

State of Minnesota
In Court of Appeals

Robert G. Dimke and Mary L. Dimke,

Appellants,

vs.

Naomi Farr, Darrel Farr, and Jon Muir,

Respondents.

**BRIEF OF APPELLANTS
ROBERT G. DIMKE AND MARY L. DIMKE**

Eric J. Nystrom (#19489X)
Meghan M. Elliott (#318759)
LINDQUIST & VENNUM P.L.L.P.
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

*Attorneys for Appellants
Robert G. Dimke and Mary L. Dimke*

Robert H. Wenner (#115873)
REICHERT, WENNER, KOCH &
PROVINZINO, P.A.
501 West St. Germain Street, Suite 101
P.O. Box 1556
St. Cloud, MN 56302

Attorneys for Respondent Jon Muir

John M. Koneck (#57472)
Peter J. Diessner (#388295)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street
Suite 4000
Minneapolis, MN 55402
(612) 492-7000

*Attorneys for Respondents
Naomi and Darrel Farr*

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I. INTRODUCTION

This appeal presents three issues. The first is whether the trial court erred by finding the Dimkes' purchase agreement was canceled without first determining whether the FARRS properly invoked the statutory cancellation procedure under Minn. Stat. § 559.217, subd. 4, which required them to allege a valid unfulfilled condition that, "by the terms of the purchase agreement cancels the purchase agreement." The second issue is whether the trial court erred in determining it did not have the ability to consider the Dimkes' equitable arguments and was bound by the legislatively provided remedy, even though "harsh in the view of the [trial court]." The third issue is whether this Court should reinstate the Dimkes' claims against Muir if it is determined that the Dimkes' purchase agreement survived the FARRS' invalid declaratory cancellation.

II. STATEMENT OF THE ISSUES

- A. Under Minn. Stat. § 559.217, subd. 4(a), "if an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either party may confirm the cancellation" by serving a notice of cancellation. The FARRS served a notice of cancellation upon the Dimkes alleging that the unfulfilled condition was the Dimkes' failure to agree to a voluntary cancellation under the parties' purchase agreement for the Property. Did the trial court err by failing to analyze whether the FARRS had alleged a valid unfulfilled condition that entitled them to serve the statutory notice invoking the summary non-judicial cancellation procedure?

Trial Court Holding

The trial court did not determine whether the FARRS had alleged a valid unfulfilled condition "which by the terms of the purchase agreement cancels the purchase agreement" in their notice of cancellation. Instead, the trial court held that it need not determine the validity of the FARRS' notice of cancellation because the Dimkes did not obtain an order suspending the FARRS' cancellation pursuant to Minn. Stat. § 559.217, subd. 4. Based on

this conclusion of law, the trial court dismissed the Dimkes' complaint and ordered the Dimkes' notice of lis pendens be discharged.

Most apposite authorities

Minn. Stat. § 559.217, subd. 4.

Mattson v. Greifendorf, 183 Minn. 580, 237 N.W. 588 (1931).

Vieths v. Thorp Finance Co., 305 Minn. 522, 524, 232 N.W.2d 776 (1975).

Coddon v. Youngkrantz, 562 N.W.2d 39 (Minn. Ct. App. 1997).

- B. The Minnesota Court of Appeals has halted statutory cancellations after the expiration of the applicable cancellation period in instances where it has determined that equity required suspension of the cancellation. Immediately after receiving the Farrs' notice of cancellation of the purchase agreement, the Dimkes filed a lawsuit alleging claims against the Farrs for specific performance, breach of contract, and breach of the implied covenant of good faith and fair dealing challenging the basis for the alleged cancellation and also filed a notice of lis pendens against the property. Did the trial court err by concluding that it could not exercise its equitable jurisdiction to halt the cancellation to determine whether the Farrs were entitled to cancel the purchase agreement pursuant to Minn. Stat. § 559.217, subd. 4(a)?

Trial Court Holding

The trial court did not address the authority allowing equitable intervention and instead held that it did not possess the authority to alter the legislatively provided remedy in Minn. Stat. § 559.217, subd. 4.

Most apposite authorities

Follingstad v. Syverson, 160 Minn. 307, 200 N.W. 90 (1924).

Coddon v. Youngkrantz, 562 N.W.2d 39 (Minn. Ct. App. 1997).

First Nat'l Bank of Glencoe/Minnetonka v. Pletsch, 543 N.W.2d 706 (Minn. Ct. App. 1996).

D.J. Enterprises of Garrison, Inc. v. Blue Viking, Inc., 352 N.W.2d 120 (Minn. Ct. App. 1984).

III. STATEMENT OF THE CASE

In July 2010, appellants Robert and Mary Dimke were looking for a lake home in the Brainerd Lakes Area when they saw for sale [REDACTED] Cass County, Minnesota 56468. The property was owned by respondents Naomi Farr and Darrel Farr. The Dimkes were told that the property had been sold to a previous buyer on April 7, 2010 (the Dimkes later learned the previous buyer was respondent Jon Muir), but that previous buyer had given the Farrs notice he was cancelling his purchase agreement. The Dimkes signed a purchase agreement for the property subject to the Farrs obtaining a cancellation of a prior purchase agreement. The Dimkes and the Farrs also scheduled a closing for the property for September 10, 2010.

On September 9, 2010, the Dimkes were told that the closing could not go forward because the Farrs had commenced—but not filed—a lawsuit against the previous buyer for specific performance and breach of contract. The Dimkes also learned that the lawsuit had been commenced several months before they entered into their purchase agreement for the property. When the Dimkes demanded that the Farrs use their best efforts to provide marketable title as required by the purchase agreement between the parties, the Farrs demanded that the Dimkes agree to a voluntary cancellation of the purchase agreement. When the Dimkes declined to voluntarily cancel the purchase agreement, the Farrs served them with a statutory notice of declaratory cancellation on October 20, 2010. (Add. 8-9.)

On October 25, 2010, the Dimkes filed a lawsuit against the Farrs and Muir in Cass County District Court. (Dimke Appendix [“D. App.”] 1.) The Dimkes alleged

claims against the Farrs for specific performance, breach of contract, and breach of implied covenant of good faith and fair dealing. (D. App. 3-4.) They alleged claims against Muir for tortious interference with contract. (D. App. 4.) The Dimkes also filed a notice of lis pendens against the property. (D. App. 39-40.) The Farrs answered claiming, among other things, that the Dimkes' claims were invalid because the Farrs had canceled the Dimke Purchase Agreement pursuant to Minn. Stat. § 559.217, subd. 4, by service of a notice of cancellation on October 20, 2010. (D. App. 42.) In addition, the Farrs asserted counterclaims against the Dimkes for slander of title, abuse of process and tortious interference with contractual relations. (D. App. 44-49.) Muir answered and, like the Farrs, asserted that the Dimkes' claims against him were based upon a contract that was void. (D. App. 66.) Muir also alleged counterclaims against the Dimkes for tortious interference with contractual relations, abuse of process, and action to determine adverse claims. (D. App. 66-67.)

By motions dated November 22, 2010, the Dimkes, the Farrs, and Muir all moved for summary judgment to determine the validity and effect of the October 20, 2010, notice of cancellation on the parties' respective claims. (D. App. 149, 151, 153.) The Farrs and Muir also requested the trial court discharge the Dimkes' lis pendens. (D. App. 151, 153.) The trial court heard the motions on December 20, 2010.

By Findings of Fact, Conclusions of Law, Order of Judgment and Judgment and Decree dated January 14, 2011, the trial court granted summary judgment to the Farrs and Muir, and dismissed the Dimkes' claims against both. (Add. 1.) The trial court further ordered that the lis pendens filed by the Dimkes on November 5, 2010, be discharged.

(Add. 5.) The trial court did not address or dismiss any of the counterclaims asserted by either the Farrs or Muir against the Dimkes.

The Dimkes filed their appeal of the trial court's judgment entered on January 14, 2011, dismissing their complaint and discharging their lis pendens on February 18, 2011. (D. App. 377-378.)

IV. STATEMENT OF THE FACTS

A. The Property

The property at issue in this litigation consists of three adjoining lots on the shore of Gull Lake in Cass County, Minnesota (collectively referred to as "the Property"). (Add. 2; D. App. 1.) The first lot is approximately 1.39 acres and includes vacant land. (D. App. 1-2.) The second lot is approximately three acres and includes the main residence (the "Main House Property"). (D. App. 1-2.) The third lot is approximately 1.84 acres and includes a boathouse. (D. App. 2.)

B. Muir's April 7, 2010 Purchase Agreements

After the Property had been on the market for several months, the Farrs and Muir entered into three separate purchase agreements on April 7, 2010, for all three adjoining lots comprising the Property, including the Main House Property. (D. App. 6.) All three purchase agreements were scheduled for a closing on or before June 10, 2010. (D. App. 156, 178, 198.)

Muir agreed to purchase the vacant lot for \$245,000 and the boathouse lot for \$300,000. (D. App. 156, 178.) Pursuant to the terms of the purchase agreements, Muir also agreed to pay a total of \$5,500 (\$2,500 and \$3,000, respectively) in earnest money

for the two properties to the Farrs within three days of the Farrs' acceptance. (D. App. 156, 178.)

Muir also agreed to purchase the Main House Property for \$1,575,000, and to deposit \$11,000 in earnest money for the property within three days of the Farrs' acceptance. (D. App. 198.) Muir's purchase of the Main House Property was subject to a financing contingency that required him to use his best efforts to obtain a conventional thirty-year mortgage with an interest rate of six percent by the closing date. (D. App. 205.) If Muir was unable to obtain this financing, and the closing did not occur by June 10, 2010, Muir's purchase agreement for the Main House Property was canceled by its terms. (D. App. 205.) However, on April 22, 2010, 15 days after signing the purchase agreements, Muir sent the Farrs a cancellation of the purchase agreements. (Add. 275.) There is no dispute that Muir's purchase agreements did not close on or before June 10, 2010 as required in all three of Muir's purchase agreements.

C. The Undisclosed and Unfiled Lawsuit

On or about May 20, 2010, Naomi Farr sued Muir alleging claims for specific performance and breach of contract. (D. App. 276-287.) According to Naomi Farr's complaint, Muir had satisfied all contingencies related to the three purchase agreements, including the deposit of earnest money and the approval of financing. (D. App. 281-282.) However, Ms. Farr's lawsuit was not filed in Cass County District Court until more than four months later, on September 27, 2010.

In response to Ms. Farr's complaint, Muir denied that he had satisfied all contingencies related to the three purchase agreements. (D. App. 372-374.) Specifically,

Muir stated that he was not allowed to satisfy the inspection contingency contained in his purchase agreement for the Main House Property. (D. App. 373.) In addition, Muir alleged counterclaims against Ms. Farr for breach of contract and misrepresentation. (D. App. 374-376.) In his breach of contract claim, Muir alleged that Ms. Farr's failure to accept his cancellation as a result of his inability to obtain financing and her refusal to allow him to inspect the property were breaches of Muir's purchase agreements. (D. App. 375.) The Dimkes, however, were never informed of the pending litigation initiated by Ms. Farr against Muir. (D. App. 241.)

D. The Farrs' Retention of a New Real Estate Broker

The Farrs initially listed the Property with Bruce Larson of Larson Group Real Estate. (D. App. 365.) But on June 27, 2010, the Farrs retained Jim Christensen as a listing agent for the sale of the Property. (D. App. 265, 288.) Mr. Christensen listed the property under his name on June 28, 2010. (D. App. 288.)

Shortly before being formally retained, Christensen met with the Farrs to discuss the Property. (D. App. 288-289.) The Farrs told Christensen that the Property had been previously listed by a different agent/broker, and that purchase agreements for all three lots had been signed. (D. App. 288-289.) The Farrs also told him that the previous buyer had provided the Farrs with a cancellation of those purchase agreements and that as soon as they received another purchase agreement, they would accept the cancellation of those purchase agreements. (D. App. 288-289.) The Farrs deny having this conversation. (D. App. 365.) After showing the property several times, Christensen showed the property to the Dimkes in late July or early August 2010. (D. App. 289.)

E. The Dimkes' Purchase Agreement

The Dimkes loved the Main House Property, and on August 8, 2010, they entered into a Purchase Agreement with the Farris for it in the amount of \$1,000,000, the full listing price. (D. App. 243-274.) The Dimkes understood that the Purchase Agreement was subject to the Farris' acceptance of Muir's April 22, 2010, cancellation—which the Farris had already obtained. (D. App. 275.) The Dimkes also understood that the Farris would sign and accept Muir's cancellation of his purchase agreements once the Dimkes signed the Purchase Agreement with the Farris for the Main House Property. (D. App. 240.) This understanding is confirmed in unambiguous terms on the face of the Purchase Agreement which states "NA" or "Not Applicable" in the blank space requesting the date by which the necessary cancellation would be obtained:

48. This Purchase Agreement IS IS NOT subject to cancellation of a previously written purchase agreement
------(Check one)-----
49. dated _____,
50. (If answer is IS, said cancellation shall be obtained no later than _____ NA _____, NA _____. If
51. said cancellation is not obtained by said date, this Purchase Agreement is canceled. Buyer and Seller shall immediately
52. sign a *Cancellation of Purchase Agreement* confirming said cancellation and directing all earnest money paid
53. hereunder to be refunded to Buyer.)

(Add. 6; D. App. 244.) In fact, the Farris had already received the necessary cancellation on April 22nd, and merely needed to agree to it. (D. App. 275.)

The Purchase Agreement further provided that the Farris were required to use their best efforts to provide marketable title by the date of closing:

125. If property is not available by the date of closing, in the event Seller has not
126. Seller shall use Seller's best efforts to provide marketable title by the date of closing. In the event Seller has not
127. provided marketable title by the date of closing, Seller shall have an additional 30 days to make title marketable, or in
128. the alternative, Buyer may waive title defects by written notice to Seller. In addition to the 30-day extension, Buyer
129. and Seller may, by mutual agreement, further extend the closing date. Lacking such extension, either party may declare
130. this Purchase Agreement canceled by written notice to the other party, or licensee representing or assisting the other
131. party, in which case this Purchase Agreement is canceled. If either party declares this Purchase Agreement canceled,
132. Buyer and Seller shall immediately sign a *Cancellation of Purchase Agreement* confirming said cancellation and
133. directing all earnest money paid hereunder to be refunded to Buyer.

File in Dimkes

(Add. 7; D. App. 245.)

Pursuant to their obligations under the Purchase Agreement, the Dimkes deposited \$50,000 in earnest money and obtained the necessary financing for the purchase of the Main House Property. (D. App. 240.) To their knowledge, all conditions and contingencies related to their purchase had been satisfied and they looked forward to the closing scheduled for September 10, 2010. (D. App. 240.)

F. The Farris Knew that the Muir Purchase Agreements were Invalid and No Cancellation of Those Agreements Was Necessary

The Dimkes entered into the Purchase Agreement with the understanding that the Farris would confirm Muir's earlier cancellation of Muir's purchase agreement. (D. App. 240.) The Dimke Purchase Agreement required the Farris to use their best efforts to obtain marketable title. (D. App. 245.) After the Dimkes signed the Purchase Agreement, Christensen directed his office assistant to contact the Farris and confirm they had signed the cancellation of Muir's purchase agreements. (D. App. 289.) Mr. Christensen's assistant contacted the Farris' daughter, Lucinda Gardner, by email stating, "Can you update me as to the status of the previous buyer's cancellation of purchase agreement – or provide us something in writing that we don't need that anymore." (D. App. 359.) Ms. Gardner replied that, "I will be forwarding you a copy of the previous buyer's answer in the lawsuit where they state there is not a valid purchase agreement. According to our attorney, this should be all that is needed in this regard." (D. App. 359.)

Despite the requirement in the Dimke's Purchase Agreement that the Farrs use their "best efforts" to obtain marketable title, Naomi Farr submitted an affidavit to the trial court stating that the Farrs never intended to cancel Muir's purchase agreement and never determined the Muir purchase agreements were invalid. (D. App. 364-366.) In fact, the Farrs never intended to do anything that would jeopardize their claims in their lawsuit against Muir. (D. App. 364-366.)

G. Muir's Attorney's Communication with the Farrs' Attorney on September 9, 2010

On September 9, 2010, the day before the Dimkes' closing, Muir's attorney wrote to the Farrs' attorneys (in correspondence delivered by facsimile and messenger) stating:

Due to our recent lack of communication, please be advised that my client, Jon Muir, intends to proceed to closing on the purchase of the three parcels of real estate situated in Cass County, Minnesota, as referenced in the Purchase Agreements signed by Mr. Muir and your client, Naomi Farr, dated April 7, 2010. In that regard, I have enclosed herein a certified check in the amount of \$16,500 representing the earnest money required under the three purchase agreements referenced above. This check is to be retained by you in trust pending the closing of these transactions. I have also enclosed a letter from Bremer Bank confirming that Mr. Muir has been approved for financing on the main home parcel up to \$1,575,000.

Prior to closing on the transactions, Mr. Muir is entitled to inspect the property and have it appraised. Assuming that all of the contingencies established in the Purchase Agreements are satisfied in a timely manner, Mr. Muir will be in a position to close on all three transactions within 30 days of today's date.

You previously advised me that one of the parcels referenced above is subject to a pending sale to an unknown party. Please immediately notify that individual that Mr. Muir's status as

purchaser of the property is superior to any purported subsequent purchaser, particularly due to the fact that Ms. Farr failed to cancel the Purchase Agreements pursuant to Minnesota law. Needless to say, any closing on the pending sale should be canceled.

(D. App. 219.)

Based on his attorney's correspondence, Muir paid earnest money on September 9, 2010 that, under Muir's purchase agreements with the Farr, should have been paid by

April 10, 2010. (D. App. 219.) It is also clear that Muir did not have the opportunity as provided in the inspection contingency in his purchase agreements to inspect the property. (D. App. 219.)

H. The Canceled Closing

On the evening of September 9, 2010, Christensen contacted Robert Dimke by telephone and informed him that the title company had canceled the closing and would not move forward because of a lack of clear title to the Main House Property as a result of the Farrs' failure to finalize the cancellation of Muir's purchase agreement and the undisclosed lawsuit. (D. App. 240–241, 289-290.) It is unclear who provided this information to the title company. But one thing is certain—it was not the Dimkes.

In response to the canceled closing, the Dimkes retained an attorney to help facilitate the closing. On September 20, 2010, the Dimkes' attorney wrote to the Farrs' attorney requesting that the Farrs meet their obligations under the Purchase Agreement, and requesting information regarding the purported cause of the canceled closing—the undisclosed, unfiled lawsuit. (D. App. 223-226.) The Farrs never directly responded to the September 20 correspondence.

I. The Farrs' Attempts to Force Cancellation

1. *The Farrs' October 13, 2010 Correspondence "Cancelling" the Dimkes' Purchase Agreement.*

Instead of using their best efforts to provide marketable title as required under the Purchase Agreement, on October 13, 2010, the Farrs' attorney wrote to Christensen, not the Dimkes or their attorney at the time, alleging that the Farrs were unable to obtain

marketable title to the property, and were therefore cancelling the Purchase Agreement. (D. App. 286.) The Farrs then requested that Christensen get the Dimkes to sign a voluntary cancellation of the Purchase Agreement. (D. App. 286.) Because of their interest in and commitment to purchase the Main House Property, the Dimkes refused to voluntarily cancel the Purchase Agreement.

2. *The Notice of Cancellation.*

On October 20, 2010, the Farrs served the Dimkes with a document entitled “notice of cancellation.” (Add. 8-9.) Pursuant to the notice, the Farrs alleged the Purchase Agreement with the Dimkes was “canceled” and that the “unfulfilled condition” allowing the cancellation was the Dimkes’ failure to agree to voluntarily cancel the Purchase Agreement. (Add. 8.) The notice of cancellation also provided, “[t]he cancellation of the purchase agreement is complete, unless, within 15 days after the service of the notice upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation.” (Add. 8.)

After learning that the Farrs were making every effort to close on the sale of the three properties to Muir in violation of the Dimkes’ Purchase Agreement, on October 25, 2010, the Dimkes filed a lawsuit against the Farrs and Muir and filed and recorded a notice of lis pendens against the Main House Property. After attempting to personally serve the Farrs in Florida and in Minnesota with no success, the Farrs’ counsel agreed to accept service of the summons and complaint on October 29, 2010. (D. App. 229.) After service of the summons and complaint, the Dimkes heard nothing further from the

Farrs or Muir, until November 10, 2010, when the Farrs' attorney wrote baldly declaring: "[t]he purpose of this letter is to inform you that, because the Purchase Agreement has been statutorily terminated, your claims against the Farrs are without merit." (D. App. 231-233.)

V. ARGUMENT

A. Standard of Review.

The Dimkes appeal from the trial court's grant of summary judgment to the Farrs and Muir. Appellate review of a grant of summary judgment is de novo and requires the Court to determine whether the trial court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment. Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC, 790 N.W.2d 167, 170 (Minn. 2010). Similarly, "the interpretation of a statute is a question of law that [appellate courts] review[] de novo." Weston v. McWilliams & Assoc., Inc., 716 N.W.2d 634, 638 (Minn. 2006). "To interpret a statute, [a court must] first assess 'whether the statute's language, on its face, is clear or ambiguous.' If the law is 'clear and free from all ambiguity,' the plain meaning controls and is not 'disregarded under the pretext of pursuing the spirit.'" Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 726 (Minn. 2010) (internal citations omitted).

B. The Trial Court Erred By Failing to Analyze Whether the Farrs' Notice of Cancellation was Valid Under Minn. Stat. § 559.217, subd. 4.

The trial court erred when it failed to analyze whether the Farrs' notice of cancellation met the requirements set forth in Minn. Stat. § 559.217, subd. 4, before it determined that the Dimkes' Purchase Agreement had been canceled. Minnesota Statute

§ 559.217, subd. 4, enumerates two requirements that must be met before a party may serve a declaratory cancellation: first, there must be an unfulfilled condition; second, that unfulfilled condition must, by the terms of the agreement, cancel the purchase agreement. This Court should reverse the trial court's decision and remand this matter back to the trial court for findings consistent with the requirements set forth in Minn. Stat. § 559.217, subd. 4.

1. *Minn. Stat. § 559.217, subd. 4.*

Minnesota Statute § 559.217, initially adopted by the Minnesota Legislature in 2004, deals with the cancellation of residential purchase agreements and is modeled on the so-called contract for deed cancellation statute that has been long been part of Minnesota law. Section 559.217, subd. 4, provides, in pertinent part:

Declaratory Cancellation. (a) If an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either the purchaser or the seller may confirm the cancellation by serving upon the other party to the purchase agreement and any third party that is holding earnest money under the purchase agreement a notice:

- (1) specifying the residential real property that is the subject of the purchase agreement, including the legal description;
- (2) specifying the purchase agreement by date and names of parties, and the unfulfilled condition; and,
- (3) stating that the purchase agreement has been canceled

- (c) The cancellation of the purchase agreement is complete, unless, within 15 days after the service of the notice upon the other party to the purchase agreement the party upon whom the notice was served secures from a court an order suspending the cancellation.

(Emphasis added.)

As set forth in the plain language of section 559.217, subd. 4, a “declaratory cancellation,” merely confirms a valid cancellation that has already transpired pursuant to the terms of the applicable purchase agreement because of an unfulfilled condition. Thus, it can only be used in the case of a failure of a condition in a purchase agreement. Under Minnesota law, this Court must construe this plain language in a manner that will not lead to injustice or an absurd result. In re Estate of Ablan, 591 N.W.2d 725, 727 (Minn. Ct. App. 1999) (citing Minn. Stat. § 645.17(1), which provides that “In ascertaining the intention of the legislature the courts may be guided by the following presumptions: (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”).

2. *A Declaratory Cancellation Served Without a Prior, Valid Cancellation or Unfulfilled Condition is Ineffective.*

The Dimkes do not dispute the service of the notice. Instead, the Dimkes challenged the validity of the Farrs’ notice of cancellation because, contrary to the notice of cancellation, there was no valid unfulfilled condition which, by its terms, canceled the Purchase Agreement. And the Farrs’ claimed “unfulfilled condition”—that the Dimkes were obligated under the terms of the Purchase Agreement to agree to a voluntary cancellation—is not valid under the clear terms of the Purchase Agreement.

There are few cases interpreting Minnesota Statute § 559.217, subd. 4, and the Dimkes have been unable to find any cases that are controlling here. But because Minnesota Statute § 559.217 is modeled on the contract for deed cancellation statute,

cases interpreting that statute provide persuasive guidance. These cases illustrate that Minnesota courts will examine whether a party is entitled to a statutory cancellation before ruling that a contract has been validly canceled.

Minnesota courts strictly construe the contents of a notice of cancellation because of the consequences resulting from these cancellations. O'Meara v. Olson, 414 N.W.2d 563, 567 (Minn. Ct. App. 1987) (holding that statute providing for statutory cancellation of a contract for deed must be strictly followed to afford the vendee protection against arbitrary termination of rights under the contract). Under Minnesota's contract for deed cancellation statute, a notice of cancellation of an agreement which is served prior to an actual default is ineffective. See Mattson v. Greifendorf, 183 Minn. 580, 237 N.W. 588 (1931); Vieths v. Thorp Fin. Co., 305 Minn. 522, 524, 232 N.W.2d 776, 778 (1975); Coddon v. Youngkrantz, 562 N.W.2d 39 (Minn. Ct. App. 1997) (holding that default is the threshold requirement that allows a vendor to invoke statutory cancellation).

In Mattson, a defendant/vendee successfully challenged the validity of a cancellation based on alleged default resulting from the defendant's failure to timely pay taxes owing under a contract for deed. Mattson, 183 Minn. at 583, 237 N.W. at 589. The defendants had acted in good faith to pay the taxes owing on the property, but could not because of the plaintiff/vendor's failure to take actions to apportion the amounts the defendant/vendee was required to pay. Id. In rejecting the plaintiff/vendor's cancellation, the Court reasoned: "[i]f there was no default, or if the trifling default here in question occurred under such circumstances that the defendants were not to blame therefor, then there was no ground for canceling the contract...there was no real default

at the time the notice of cancellation was served and no justification for the attempted cancellation.” Id.

Although Minnesota Statute § 559.217, subd. 4, governs declaratory cancellations and thus does not require a default as in the case of a statutory cancellation of a contract for deed, the analogy is still instructive. The “threshold requirement” of a cancellation of a contract for deed is a default. Similarly, the “threshold requirement” of a declaratory cancellation is an unfulfilled condition which by the terms of the purchase agreement cancels that agreement. A residential purchase agreement is a contract, and nothing in Minn. Stat. § 559.217 suggests that the declaratory cancellation procedures override the contractual obligations of the parties to the contract. The Farrs’ service of a notice of declaratory cancellation without stating a valid unfulfilled condition is ineffective because without meeting these threshold requirements, the Farrs had no grounds to cancel the contract and the statute cannot apply.

Although not cited in the trial court’s order, the Farrs cited three cases below (all evaluating cancellations for contracts for deed) for the proposition that after the expiration of the statutory cancellation period a trial court need not analyze the basis for the cancellation as in Mattson, Vieths and Coddon. The cases cited by the Farrs are legally and factually inapposite. In Brickner v. One Land Development Co., 742 N.W.2d 706, 711 (Minn. Ct. App. 2007), the party challenging the cancellation of the contract for deed at issue *took no action* during the 60-day cancellation period and did not file an adverse action for eleven months after the statutory cancellation took effect. The Court held the challenging party had abandoned the contract. Here, the Dimkes filed a lawsuit

within the statutory cancellation period. Thus, the Farrs were immediately aware that the Dimkes were challenging the validity of the cancellation.

The Farrs also referenced Sundberg v. Sundberg, an unpublished case involving the cancellation of a contract for deed and eviction proceedings. No. A05-1845, 2006 WL 1806394, *1 (Minn. Ct. App., July 3, 2006) (D. App. 352-356.). In Sundberg, this Court upheld the district court's ruling that it could not consider defenses to a cancellation in an eviction proceeding, reasoning that "because of the limited scope of an eviction proceeding, a party may not challenge the ownership of title of the property in an eviction action, but should raise these issues in separate district court proceedings." Id. The Court of Appeals specifically noted that the party seeking to avoid cancellation also had an action pending in district court. Id. The holding in Sundberg does not stand for the proposition that a trial court need not analyze the basis upon which a party seeks to cancel. Rather, Sundberg confirms the summary nature of eviction proceedings.

Finally, the Farrs cited another unpublished case, Pachtchenko v. Minich, No. A04-312, 2004 WL 2938834 (Minn. Ct. App., Dec. 21, 2004) (D. App. 346-351.). In Pachtchenko, the party challenging the cancellation of the contract for deed (Pachtchenko) attempted to argue on appeal that the trial court erred in failing to consider whether he had actually defaulted on the contract before allowing the cancellation. This Court rejected Pachtchenko's argument based on its finding that the district court had evaluated his default and determined Pachtchenko defaulted, entitling the cancelling party to serve a notice of cancellation. Again, this is not the Dimkes' argument. Here, the trial court made no findings with respect to the two requirements triggering the Farrs'

ability to serve a declaratory cancellation – (1) the presence of an unfulfilled condition that (2) by its terms cancels the purchase agreement.

Based on a plain reading of the statute and persuasive Minnesota case law, the trial court was required to analyze whether the Farrs had stated a valid unfulfilled condition which by its terms cancelled the Purchase Agreement entitling the Farrs to in turn *confirm* that cancellation. The trial court did not conduct this analysis. Thus, the trial court did not evaluate whether the Farrs could enter into the Dimke Purchase Agreement when they had no intention of ever cancelling the Muir purchase agreements or dismissing their lawsuit against Muir while at the same time being obligated to use their best efforts to provide marketable title to the Dimkes. This Court should remand this matter to the trial court to conduct this analysis.

C. The Trial Court Erred By Failing to Consider Its Equitable Jurisdiction to Halt the Farrs' Declaratory Cancellation.

The trial court erred by failing to consider its equitable jurisdiction to halt the Farrs' declaratory cancellation. This Court should remand this matter back to the trial court for consideration of the Dimkes' equitable argument that they are entitled to an equitable injunction halting the cancellation of the Purchase Agreement.

On November 10, 2010, the Farrs unilaterally declared that the Purchase Agreement had been statutorily terminated, and as a result, the Dimkes' claims against the Farrs were without merit. In support of their declaration, the Farrs cited Olson v. Northern Pacific Railway Co., 126 Minn. 229, 148 N.W. 67 (1914). In Olson, a vendee who defaulted by failing to pay nearly half of the required payments under a contract for

deed attempted to bring an action against the vendor for alleged misrepresentations regarding the property. Id. at 230. The Minnesota Supreme Court held that he could not, reasoning that, “it cannot be that a person may enter a contract to buy property for a large sum to be thereafter paid, never make the payments agreed upon, suffer the other party to cancel the contract by reason of default, and then sue and recover heavy damages for deceit inducing him to buy property which he never saw fit to accept or pay for.” Olson has been repeatedly cited for the proposition that a party who defaults, resulting in a cancellation of the contract for deed, cannot then sue on that contract.

Olson and its progeny are not controlling here where the party seeking to invoke the statutory cancellation procedure has acted improperly and inequitably. Instead, this Court should adopt the rationale of the Minnesota Court of Appeals in Coddon as a guide. In Coddon, the court reversed and remanded a trial court’s decision allowing the cancellation of a contract for deed in which the trial court held it did not have jurisdiction to apply equity to statutory cancellations. 562 N.W.2d at 44. Based on the facts in Coddon, the court found that the vendor’s actions appeared to be an attempt to create and force a default in breach of the implied covenant of good faith and fair dealing, and as a result, it voided the cancellation and reinstated the contract. Id. In reversing the trial court, the Court of Appeals rejected the notion that the legislature intended, “such complete tying of the hands of equity,” citing several other cases where Minnesota courts have reached the same conclusion. Id.; see, e.g., Follingstad v. Syverson, 160 Minn. 307, 311-12, 200 N.W. 90, 92 (1924) (determining, in connection with the brief statutory redemption period for cancellation of contracts for deeds, “we are dealing with an all too

inelastic statute. It does not discriminate, as law ought to discriminate, between those who deserve its indulgence and those who have forfeited all right to it”); Mattson, 183 Minn. 580, 237 N.W. 588, 583 (1931) (rejecting argument that the court is required to disregard equities in case involving statutory cancellations); D.J. Enters. of Garrison, Inc. v. Blue Viking, Inc., 352 N.W.2d 120, 121-22 (Minn. Ct. App. 1984).

Application of equitable principles is also warranted where a party attempts to protect their legal rights by other legal means before seeking an equitable injunction. See First Nat’l Bank of Glencoe/Minnetonka v. Pletsch, 543 N.W.2d 706, 711 (Minn. Ct. App. 1996). Here, the Dimkes filed their summons and complaint well within the 15-day notice period, and promptly served the Farrs. The Farrs had immediate notice that the Dimkes challenged the basis for the attempted cancellation. The Dimkes’ lawsuit put the Farrs in the same position as they would have been in had the Dimkes instead filed and been granted a temporary restraining order. If the Dimkes had obtained an order halting the cancellation, the next step would have been a determination of the Farrs’ right to cancel the Dimke Purchase Agreement. This is exactly the analysis the Dimkes’ are requesting this Court require the trial court to undertake.

The trial court noted that its decision was consistent with providing a method of stability in the real estate market which extinguishes claims unless immediate action is taken to preserve those claims. But the trial court’s reasoning ignores the process set in motion by the Dimkes’ lawsuit. If the Dimkes had obtained an injunction halting the cancellation at the end of the 15-day period, the Farrs’ attempted cancellation would not automatically be invalidated. Instead, the parties would then address the merits of the

attempted cancellation, and the court would determine if the FARRS had a substantive basis to cancel the purchase agreement. Thus, because the DIMKES filed a complaint and lis pendens within the 15-day period, the parties are in the same position. Given the FARRS' actions, and the DIMKES' prompt action in seeking relief, equitable principles are warranted here. And, therefore, the trial court erred by failing to consider its equitable jurisdiction.

D. If the Trial Court Erred in Upholding the FARRS' Declaratory Cancellation, the DIMKES' Claims Against Muir Must Be Reinstated.

The trial court dismissed the DIMKES' claims against Muir holding, "[s]ince the purchase agreement is void, there is no contract which can be interfered with. Consequently, the claims against Muir must be dismissed." The trial court made no further findings or conclusions with respect to the DIMKES' claims against Muir. If this Court reverses the trial court's judgment validating the FARRS' declaratory cancellation, the Court should also reinstate the DIMKES' claims against Muir.

VI. CONCLUSION

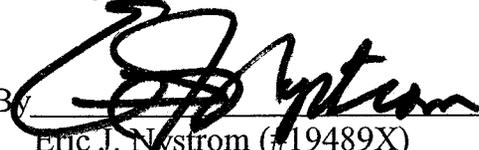
The trial court erred when it failed to analyze whether the FARRS' notice of cancellation met the requirements set forth in Minn. Stat. § 559.217, subd. 4, before it determined that the DIMKES' Purchase Agreement had been canceled. The trial court further erred by failing to consider its equitable jurisdiction to halt the FARRS' declaratory cancellation. This Court should reverse the trial court's grant of summary judgment to the FARRS and Muir and require the trial court to undertake the analysis required under Minn. Stat. § 559.217, subd. 4 and of the DIMKES' entitlement to an equitable injunction.

If this Court reverses the trial court's judgment validating the Farrs' declaratory cancellation, the Court should also reinstate the Dimkes' claims against Muir.

Respectfully submitted,

Dated: April 5, 2011

LINDQUIST & VENNUM P.L.L.P.

By 
Eric J. Nystrom (#19489X)
Meghan M. Elliott (#318759)

4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: 612-371-3211

**Attorneys for Appellants Robert G. Dimke
and Mary L. Dimke**