

*State of Minnesota
In Court of Appeals*

(Case No. A111456)

Thomas A. Graikowski

Appellant,

vs.

HSBC Mortgage Services, Inc.

Respondent,

and

KariAnn Kimberly Coleman, and
Atlantic Credit & Finance, Inc.,

Defendants.

Appellant's Reply Brief

BATTINA LAW, PLLC

Bryan R. Battina (#338102)
1907 E. Wayzata Blvd.
Suite 170
Wayzata, MN 55391

Attorneys for Appellant

MORRISON FENSKE & SUND

Maret R. Olson (#025356X)
5125 County Road 101
Suite 202
Minnetonka, MN 55345

Attorneys for Respondent

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INTRODUCTION

Appellant Thomas Graikowski (“Appellant”) respectfully submits his Reply Brief. Respondent’s brief fails to show why the plain language of Minn. Stat. § 507.02 does not void the mortgage at issue. Likewise, Respondent’s cited case law is either easily distinguishable from the present facts or actually supports Appellant’s case. Moreover, Respondent incorrectly applies the equitable estoppel test. Appellant respectfully requests the district court be reversed, the mortgage be declared void by operation of Minn. Stat. § 507.02, and that Appellant remain liable on the debt.

ARGUMENT

Despite the plain language Minn. Stat. §507.02 and over a century worth of case law providing guidance, Respondent continues to approach the analysis incorrectly. It is clear and undisputed that the property at issue is homestead property, that Appellant was married at the time the property was mortgaged, and that his then wife did not sign the mortgage as required by law. (AA2, AA3- Findings of Fact 3, 6, 9, 11, 12). Therefore, the analysis must begin with mortgage being void by operation of Minn. Stat. § 507.02. *Dvorak v. Marring*, 285 N.W.2d 675, 677 (Minn. 1979) (without the signature of both spouses, a conveyance of homestead property is not merely voidable but is void, and the buyer acquires no rights whatsoever in the property). The mortgage remains void unless statutory exceptions apply or factual circumstances require the application of equitable estoppel. *Karnitz v. Wells Fargo Bank, N.A.*, 572 F.3d. 572, 575 (8th Cir. 2009) (citing *Dvorak*, 285 N.W.2d at 677-78) (three elements are required for a

showing of estoppel: i) the non-signing spouse consents to and has prior knowledge of the transaction; ii) the non-signing spouse retains the benefits of the transaction; and iii) the party seeking to invoke estoppel has sufficiently changed its position to invoke the equities of estoppel). Thus, the inquiry into estoppel is a subsequent inquiry and only necessary when the statute applies.

While the district court plainly refused to apply an unambiguous statute to undisputed facts, Respondent's argument errors in a different regard. Respondent confuses the applicability of Minn. Stat. § 507.02 with the application of estoppel. Respondent does so by failing to acknowledge that the mortgage is void as a matter of law. In fact, Respondent's argument for the district court's proper construction of the statute is actually a cloaked argument for estoppel.¹

Additionally, Respondent's brief successfully sets up several straw man arguments supposedly advanced by Appellant, chiefly that the lender is required to prove that the signing borrower intended to perpetrate a fraud and that a showing of estoppel against the non-signing spouse is required in this case. Appellant has never made either of these fanciful propositions. Rather, Appellant's position is, and always has been, that the undisputed facts of this case do not support a finding of estoppel because Respondent fails to satisfy all the elements of the estoppel test articulated in *Karnitz*. The undisputed facts of this case lead to one conclusion; the mortgage is void and estoppel does not apply.

¹ It is important to note that the district court's findings were not based upon estoppel but rather upon the district court's refusal to recognize the mortgage as void under Minn. Stat. § 507.02. (AA7-Conclusions of Law 10).

I. THE PLAIN LANGUAGE OF MINN. STATE § 507.02, CONSISTANT WITH BINDING PRECEDENT, VOIDS CONVEYANCES OF HOMESTEAD PROPERTY WITHOUT THE SIGNATURE OF BOTH SPOUSES FOR ALL PURPOSES.

Contrary to Respondent's contention, a conveyance of homestead property that lacks the signature of both spouses is void for all purposes. Section 507.02 of the Minnesota Statutes states in relevant part:

If the owner is married, no conveyance of the homestead... shall be valid without the signature of both spouses.

Minn. Stat. § 507.02 (2010) (emphasis added).

In over a century of case law interpreting the signature requirement, courts have consistently found a conveyance of homestead property without the signature of both spouses is not merely voidable but is void. See *Dvorak*, 285 N.W.2d at 677-78. The requirement has been enforced in difficult circumstances even at the expense of deserving parties. *E.g.*, see *Rux v. Adam*, 143 Minn. 35, 172 N.W. 912 (1919) (voiding a deed of homestead property from a husband to his assumed wife and mother of his six children, currently living on the property, because it lacked the signature of his estranged wife of 19 years living in another state); See also *St. Dennis v. Mullen*, 157 Minn. 266, 196 N.W. 258 (1923) (voiding a deed of homestead property not joined in execution by both spouses even though the non-signing spouse had been living separate and apart for 38 years and had never set foot on the property). Appellant's Brief cites numerous cases that will not be reproduced here, but the legal principle at issue is longstanding in Minnesota real estate law.

For the purposes of this Reply, the focus will be on Respondent's contention that this well-established principle is not absolute and requires an adjudication of the rights of a non-signing spouse regarding conveyances of homestead land. Respondent's Brief at 9. To the extent that estoppel may indeed be applied to rescue an otherwise void conveyance, Respondent is correct.² However, the mere possibility of estoppel does not justify the district court's interpretation of Minn. Stat. § 507.02, as Respondent seems to suggest. The district court decided that the application of the statute in this case would produce an absurd result citing Minn. Stat. 645.17 (1). (AA7-Conclusions of Law 10). Whether estoppel does or does not apply has little bearing on whether the court properly interpreted the applicability of Minn. Stat. § 507.02.

Respondent's argument that the district court properly interpreted the plain language of Minn. Stat. § 507.02 fails to address the central issue of this appeal and amounts to little more than argument for the application of estoppel. Respondent's Brief at 8-10. Respondent argues in relevant part that:

Graikowski argues that a mortgage is void for all purposes unless it is signed by the spouse. However, nothing in that statutory language itself compels this result, nor do the cases interpreting this statute and its predecessors establish such a rigid rule.

Respondent's Brief at 8.

This argument is contradicted by even the most rudimentary reading Minn. Stat. § 507.02. "No conveyance of the homestead, ... shall be valid without the signature of both spouses." Minn. Stat. § 507.02 (2010). The plain statutory language compels that

² A successful estoppel claim must satisfy all elements of the test articulated in *Karnitz*. The undisputed facts demonstrate that Respondent fails to meet those elements.

the mortgage is void for all purposes. Moreover, the binding precedent reinforces that interpretation dating all the way back to the 1875 case of *Barton v. Drake*, where the court held, “[t]he plain meaning of the section is that a mortgage or other alienation of the homestead by the husband without the wife’s signature, is wholly void.” 21 Minn. 299, 304 (1875). More recently the court affirmed this established legal principle in *Dvorak* holding, “without the signature of both spouses, a conveyance of homestead property is not merely voidable but is void, and the buyer acquires no rights whatsoever in the property.” *Dvorak*, 285 N.W.2d at 677-78.

Respondent offers two cases in support of its argument that Minn. Stat. § 507.02 does not void conveyances for all purposes. The Respondent’s cases purportedly justify the district court’s refusal to apply Minn. Stat. § 507.02. However, Respondent’s cases offer no support for the district court’s interpretation, and in fact, actually bolster Appellant’s arguments.

First, Respondent cites *Weitzner v. Thingstad*, 55 Minn. 244, 56 N.W. 817 (1893). In *Weitzner*, plaintiff brought an action against a married homeowner seeking damages for the married homeowners refusal to perform a contract to convey real property. *Id.* at 246-47. Plaintiff and married homeowner entered into a contract for the purchase of real property which included homestead property and non-homestead property. *Id.* at 247. Married homeowner’s spouse did not join in signing the contract. *Id.* The court recognized that, “conveyances and contracts to convey the homestead, executed by the husband without his wife joining therein are not merely voidable, but wholly void.” *Id.*

However, the question before the *Weitzner* court was whether the married homeowner was liable for damages in contract arising from his non-performance. *Id.* The court divided the analysis into the homestead tract and all other tracts of land. As to the homestead portion of the contract, the court found that it would be illogical to hold a person liable for damages when he is under no legal obligation to perform the contract. *Id.* The court reasoned that on legal principles of contract law such a contract, as it pertained to the homestead, must be held void for all purposes. The court reasoned further that:

“there is nothing unjust to the obligee in holding such a contract absolutely void for all purposes. He is bound to know the law, and he always has actual notice, or the means of obtaining actual notice, of the fact that the land with which he is about to deal is homestead.”

Id. at 247-48.

The court went on to rule, and Respondent correctly cites, that a contract for conveyance of homestead and other lands was *unenforceable* to convey the homestead, but was *enforceable* as to non-homestead lands. *Id.* at 248. The *Weitzner* court reasoned that the statute does not void parts of the contract that convey non-homestead land and as such the whole contract is not void for illegality. *Id.* The court stated, “the policy of the law extends no further than merely to defeat what it does not permit.” *Id.* The court stated further, “[i]t merely withholds the husbands power to alienate the homestead in that way... and it was never held that the whole grant would be void, merely because part of the land was not grantable.” *Id.*

Yet, nothing in Respondent’s accurate representation of that rule detracts from Appellant’s argument that all conveyances of homestead property are absolutely void

ab initio as a matter of law. *Weitzner* clearly establishes that conveyances of homestead property are absolutely void even if other parts of a contract are valid and enforceable. It is undisputed that the property at issue is homestead property. There is no non-homestead property at issue. Therefore, it follows that Appellant's conveyance of homestead property without the signature his wife is absolutely void for all purposes unless the court applies estoppel to rescue the conveyance. Moreover, Appellant does not contest the part of the transaction that may fall under the *Weitzner* rule. Appellant does not contest his liability on the debt and has only asserted that the conveyance of homestead property was void ab initio by operation of law.

Second, Respondent cites *Lennartz v. Montgomery*, 138 Minn. 170, 164 N.W. 899 (1917). *Lennartz* is an estoppel case and does not address the applicability of the plain language of Minn. Stat. § 507.02 to the undisputed facts of this case. As Respondent states, "the Minnesota Supreme Court ruled that were only one of two spouses selling land signed a purchase agreement, the purchaser had no right to avoid the contract and was compelled to perform *when the non-signing spouse adopted it and tendered performance by executing a contract for deed.*" Respondent's Brief at 9 (emphasis added). Respondent correctly identifies that the court's decision turned on the subsequent confirmation of the agreement by the non-signing spouse. *Lennartz* 138 Minn. at 173-74. Thus, the *Lennartz* court applied estoppel to rescue an otherwise void conveyance under Minnesota statutes.³ Therefore, *Lennartz* does not address the

³ Unlike *Lennartz*, the non-signing spouse in this case never consented to or had prior knowledge of the transaction so the *Karnitz* estoppel test is not satisfied by the undisputed facts. (AA18- Affidavit of Maret Olson at Ex. 8, pg 18, lines -23).

central issue of this appeal because it does not provide justification for the district court's interpretation.

Furthermore, Respondent's argument, based on the cited cases, *supra*, that Minn. Stat. § 507.02 only voids conveyances as they pertain to homestead property and *only* to the extent necessary to protect the spouse is only partially correct.

Respondent's Brief at 9 (emphasis added). Respondent is correct that the statute only voids conveyances of homestead property, which is precisely what Appellant argues in this case. However, Respondent is incorrect that the statute voids conveyances only to the extent necessary to protect the spouse. Respondent's novel contention ignores the plain language of the statute as well as ample case law applying the statute in situations where the non-signing spouses received no protection by its application.

For example, in *Gores v. Schultz*, banks were allowed to challenge the validity of a competing mortgage due to the failure of both spouses to sign the competing mortgage and loan documents. 77 N.W.2d 522, 525 (Minn. App. 2009). The challenge was allowed and the statute was found applicable even though a successful claim would provide no protection to the non-signing spouse. Additionally, the notion that Minn. Stat. § 507.02 is a defense personal to the non-signing spouse, as Respondent seems to suggest, was flatly rejected in *Gores*. *Id.* at 525.

Moreover, in *Marr v. Bradley*, a prospective buyer was allowed to challenge a competing purchase agreement. 239 Minn. 503, 59 N.W.2d 331 (1953). Again the statute was found applicable even though a successful claim would provide no protection to the non-signing spouse.

Like the district court, Respondent's argument confuses the object of Minn. Stat. §507.02 with its operation. The object of the statute is the protection of the non-signing spouse. See *Wells Fargo Home Mortgages, Inc. v. Newton*, 646 N.W.2d 888, 895 (Minn. App. 2002). That object is achieved by voiding all conveyances not signed by both spouses. Minn. Stat. § 507.02 (2010). The plain language of the statute voids conveyances of homestead property that lack the signature of both spouses for all purposes. *Id.* Whether estoppel is appropriate to rescue a void conveyance is a separate question from whether the statute is applicable. Consequently, the district court's decision based on the inapplicability of the statute voiding Appellant's mortgage was in error and should be reversed.

II. WHETHER APPELLANT IS A PARTY ENTITLED TO STATUTORY PROTECTION HAS NO BEARING ON WHETHER THE MORTGAGE IS VOID BY APPLICATION OF MINN. STAT. § 507.02.

Respondent argues that Appellant is not the "proper party" entitled to statutory protection and is estopped from denying the validity of the mortgage. Respondent's Brief at 10. However, as the court in *Gores* reasoned, nothing in the statutory language precludes a challenge by a party other than the non-signing spouse. *Gores* 777 N.W.2d at 525. Therefore, there is nothing in the plain language of the statute that prevents a challenge by the signing spouse because without the signature of both spouses, a conveyance of homestead property is not merely voidable but is void. *Dvorak*, 285 N.W.2d at 677-78. As discussed, *supra*, the protection offered by the statute to the non-signing spouse is the voiding of the conveyance of homestead property until it is

adopted or confirmed by the non-signing spouse. See *Marr v. Bradely*, 239 Minn. 503, 509, 59 N.W.2d 331, 334 (1953) (a conveyance of homestead property has no validity for any purpose until adopted or confirmed by the non-signing spouse). In this case, the mortgage was never adopted or confirmed by the non-signing spouse, thus the mortgage is void.

Again, Respondent attempts to blend its case for estoppel into the general applicability of the statute in the present case. Whether estoppel is warranted does not change any of the material facts that render the mortgage void under statute: Appellant's property is homestead property, Appellant was married at the time homestead property was conveyed, and the conveyance was not signed by both spouses. Those facts render the mortgage void under Minn. Stat. § 507.02 and the party so asserting is immaterial because the conveyance is not merely voidable, but wholly void. Whether the test for estoppel is satisfied has no bearing on whether the plain language of the statute is applicable in this case. Thus, this Court should reverse the ruling of the district court.

III. ESTOPPEL DOES NOT BAR APPELLANT

Respondent relies heavily on *Bozich v. First State Bank of Buhl*, 150 Minn. 241, 184 N.W. 1021 (1921). Appellant's argument has always been, that Respondent's reliance on this case is misplaced because it is factually distinguishable and does not articulate the full estoppel test.

In *Bozich*, Mr. Bozich purposefully and with knowledge that his wife should sign, executed a mortgage against the homestead property reciting his misrepresentation. *Bozich* 150 Minn. 241, 242. The Minnesota Supreme Court found that Mr. Bozich had “unquestionably perpetrated a fraud on the [bank].” *Id.* Appellant has always argued and the district court agreed that the record does not support a finding of fraud as there is no evidence Appellant knew the documents he signed at the closing indicated that he was single and unmarried. (AA8- Findings of Fact 14). Therefore, in the absence of fraud, *Bozich* is not controlling in this case.

Here, Respondent routinely mischaracterizes Appellant’s argument by asserting Appellant argues that a showing of fraud is required for a court to apply estoppel. Respondent’s Brief at 19. Appellant’s position is that since there is no fraud in this case the court must turn to the test for estoppel articulated in *Karnitz*. When this test is properly applied, the undisputed facts do not support a finding of estoppel as the first element of the test fails. See *Karnitz* 572 F.3d at 575. The non-signing spouse in this case did consent to and had no prior knowledge of the transaction. (AA16- Affidavit of Maret Olson at Ex. 8). Therefore, estoppel is not available and this Court must find that the mortgage remains void under Minn. Stat. § 507.02.

CONCLUSION

Respondent's argument boils down to a case for the application of equitable estoppel and does not address the central issue of this appeal. The statutory mandate remains clear. The mortgage was void as a matter of law from the moment it was executed by Appellant and because the non-signing spouse did not consent to and had no prior knowledge of transaction estoppel is not available to Respondent. Moreover, the district court refused to apply an unambiguous statute to undisputed facts. As such, this Court should reverse the district court, declare the mortgage void, and affirm Appellant's liability on the promissory note.

Respectfully submitted,

Date: October 27, 2011

BATTINA LAW, PLLC



Bryan R. Battina (338102)

1907 E. Wayzata Blvd.

Suite 170

Wayzata, MN 55391

Tel.: (952) 314-1344

Attorneys for Appellant