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State of Minnesota
In Court of Appeals

Dale M. Stone,

Respondent,

vs.

Selwin Ortega,

Appellant,

and

Jetmar Properties LLC,
Keith H. Hammond,

Defendants.

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of Issues..... 1

Statement of the Facts and Case 2

Argument and Authorities..... 6

I. SCOPE AND STANDARD OF REVIEW 6

II. WHEN TECHNICALITIES ARISE ONE USUALLY IS STILL HELD TO WHAT ONE AGREED TO, SHOULD HAVE EXPECTED, AND OTHERS RELIED ON 7

III. DE FACTO INCORPORATION AND DELIVERY OF DEED 10

IV. ESTOPPEL, INCLUDING CORPORATION BY ESTOPPEL, IS BROAD POWER BARRING TECHNICAL ISSUES FROM EVEN BEING RAISED TO UNFAIRLY AVOID A SITUATION 14

V. ONE CANNOT JUST WATCH, WAIT, AND LATER ATTACK EVENTS AND TRANSFERS ESPECIALLY AFTER PURCHASERS AND BIDDERS RELIED 22

Conclusion 25

Index to Appendix 26

TABLE OF AUTHORITIES

CASES: PAGES

Alexander v. DaimlerChrysler Services North America, L.L.C. Not Reported in N.W.2d, 2003 WL 22183564, Minn.App.,2003 22

Almac, Inc. v. JRH Development, Inc., 39 (N.W. 2d 919,924 (Minn. App. 1986)... 10,11

Anderson v. Graham Inv. Co., 263 N.W.2d 382, 384 (Minn. 1978) 19

Arbo Corp. v. Aidan Marketing/Distribution, Inc. 639 F.Supp. 1512 (D.Minn. 1986)..... 19

Browning v. Browning , 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1956) 23

Bukacek v. Pell City Farms, Inc., 286 Ala. 141, 237 So.2d 851 (Ala. 1943)..... 9,16

Carlson v. Presbyterian Board of Relief, 67 Minn. 436, 439, 70 N.W. 3, 4 (1897) ... 17,21

Carnel v. Travelers Ins. Co., 402 N.W.2d 190, 192-3 (Minn.App.1987)..... 18,22

City of Orange Beach v. Perdido Pass Developers, Inc. 631 So.2d 850 (Ala. 1993) 17

Claflin v. Commercial State Bank, 487 N. W.2d 242,247-248 (Minn.App. 1992) 15

Community Credit Union Services, Inc. v. Federal Exp. Services Corp. 534 A.2d 331 (D.C. 1987) 12

Cross Cos., Inc. v. Citizens Mortgage Investment Trust, 305 Minn. 111, 119, 232 N.W.2d 114, 119 (1975) 18, 21

Esty v. Cummings, 80 Minn. 516, 518, 83 N.W. 420, 421 (1900) 18, 19

Evans v. Rhode Island Hospital Trust Co., 67 Minn. 160, 163, 69 N.W. 715, 716 (1897) 17, 21

Fallon v. Triangle Management Services, Inc., 169 Cal.App.3d 1103, 1106 (1985) 18

Gaertner v. Western Elevator Co. 104 Minn. 467, 116 N.W. 945 (Minn. 1908) 16

Gardner v. W.M. Prindle & Co., 185 Minn. 147, 148-49,
240 N.W. 351, 352 (1932) 11, 16

Gresser v. Hotzler, 604 N.W.2d 379, 385 (Minn.App.2000) 17, 22

Harr v. City of Edina, 541 N.W.2d 603, 606 (Minn.App. 1996) 9

Hokanson v. Gunderson, 54 Minn. 499, 503, 56 N.W. 172, 173 (1893) 24

Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (Minn. 1989) 6

In re Klein, 9 F.Supp. 57, 59 (D.Minn.1934) 18

Macomber v. Kinney, 114 Minn. 146, 156-57, 128 N.W. 1001, 1004 (1910) 22

Meyering v. Wessels, 383 N.W.2d 670, 672 (Minn. 1986) 6

Miller v. Hennen, 438 N.W.2d 366, 369 (Minn. 1989) 14

Modrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn. 2003) 6

Northern Bldg. & Loan Ass'n v. Witherow, 205 Minn. 413,
286 N.W. 397 (Minn. 1939) 17

Norway Lake Norwegian Evangelical Lutheran Church v. Froislie,
37 Minn. 447, 35 N.W. 260 (Minn. 1887) 15, 18

Nunnelee v. Schuna, 431 N.W.2d 144, 146 (Minn.App. 1988) 6

Nussbaumer v. Fetrow, 558 N.W.2d 595, 599 (Minn.App. 1996) 24

Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc.,
59 F.Supp.2d 398 (D.N.J. 1999) 21

Prior Lake State Bank v. Mahoney, 298 Minn. 567, 568-69,
216 N.W.2d 681, 682 (1974) 23

Proulx v. Hirsch Bros. Inc. 279 Minn. 157, 155 N.W.2d 907 (Minn. 1968) 15, 16, 18

Rogers v. Benton, 39 Minn. 39, 45, 38 N.W. 765, 769 23

Ross v. Briggs & Morgan, 520 N.W.2d 432,436-37 (Minn. App. 1994) 11, 20

Schiavon v. Arnaudo Brothers 84 Cal.App.4th 374, 378 (2000) 21

Slawik v. Loseth, 207 Minn. 137, 139, 290 N.W. 228, 229 (1940) 12

State v. Rivers 206 Minn. 85, 287 N.W. 790 (Minn. 1939) 17

Timberline Equipment Co. v. Davenport, 267 Or. 64 (Or.1973) 9, 10, 19

Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Froislie, 37 Minn. 447, 35 N.W. 260 (Minn. 1887) 9

Uptown Federal Sav. & Loan Ass'n of Chicago v. Walsh, 15 Ill.App.3d 626, 305 N.E.2d 74 (Ill.App. 1973) 23

Warthan v. Midwest Consolidated Insurance Agencies, Inc., 450 N.W.2d 145, 147-48 (Minn. Ct. App. 1990) 12

Westbrook State Bank v. Anderson Land & Cattle Co., 364 NW2d 416, 420 (Minn. App. 1985) 16

White Oak Grove Benevolent Society v. Murray, 145 Mo. 622, 47 S.W. 501 (Mo. 1898) 12, 17

Willis v. City of Valdez 546 P.2d 570 (Alaska 1976) 9, 16

OTHER:

Minn.Stat.Ann. s 308A.145 11

Minn.Stat.Ann. s 302A.153 10

Minn.Stat.Ann. s 322B.175 11

Minn.Stat.Ann. s 507.34 14

Minnesota Title Standards, Standard No. 33 Adopted June 28,1946, Amended 8

8 Fletcher, Cyclopodia of Corporations § 3857 , 3889 (Perm. Ed.1992) 22

Am.Jur.2d Mortgages § 716, Collateral attack, (2003) 23

18 Minnesota Practice s 2.3 Defective Formation 22

An Empirical Study of Defective Incorporation, 29 Emory L.J. 523, 529 (1990) 20

STATEMENT OF ISSUES

When a grantor appears to release all claims by knowingly doing a quitclaim deed to be recorded (with no other recording done to mention any other claim of grantor) intentionally so grantee could appear to be more creditworthy to third parties, and then a particular third party comes along and 1) relies on this real property in grantee's name without notice of any claim of grantor and loans or extends the time for repayment of $200,000 cash in return for a mortgage from grantee, 2) forecloses and without notice of any claim holds a sale where any party may rely and purchase, 3) gives further value by bidding away the debt of $200,000 to purchase at the foreclosure sale, 4) waits out the 6 months redemption period without anyone filing or doing anything to regain the property, and then 5) obtains what is believed to be good title after waiting all required periods, with all such events happening while grantor knew of events but took no action or intervention, should the grantor in this situation afterward get declarative equitable relief to avoid the effect of the deed just because contrary to even grantor's expectations the grantee, an LLC, due to late filing of papers was not technically formed until after the deed. Such a result would be reached despite many opposing legal theories including "de facto incorporation", estoppel including corporation by estoppel, the recording statutes, a bona fide purchaser giving value, and res judicata and similar issues related to grantor taking no earlier action.

RESULT: The District Court gave back to grantor the property.

STATEMENT OF THE FACTS AND CASE

In April 2003, Selwin Ortega ("Ortega") the appellant met Keith Hammond ("Hammond"). Trial Transcript page 152 (hereinafter word "Trial" shall denote pages of the trial transcript). Keith Hammond had a real estate business which respondent Dale Stone ("Stone") was involved with and worked for. Trial 59-66. Importantly, there is no dispute that at this time this was all Ortega knew about Stone. Trial 190.

Later around May 13, 2003, to help pay for some things related to a proposed acquisition of property by Hammond and his business Jetmar Properties, Ortega loaned the business the sum of $200,000 cash in a loan for 2-3 days. Trial 155-166; See Wire Transfer Exhibit from Trial. Then Ortega, in exchange for extending the time of the $200,000 loan, and for not taking collection action to reclaim the $200,000, accepted a mortgage signed May 15, 2003, on property in Brooklyn Park that appeared to be owned by Jetmar Properties, LLC. Trial 155-166; See Mortgage Exhibit from Trial.

Prior to accepting the mortgage, title work was done on the Brooklyn Park property. Trial 123-127; See Deed exhibit from Trial. Based on all that was found in the land records it appeared that Jetmar Properties, LLC was the complete and full title owner of the property in question, having got such ownership by quit claim deed from Stone. Trial 123-127. This quit claim deed found in the land records from Stone was done on May 14, 2003 for the clear purpose, as found by the Court, that the grantee, Jetmar Properties LLC, would appear to own the property to lenders. Trial 39-46. As the Court noted: "Hammond requested that Stone convey the Duplex to Jetmar in order to allow Hammond to obtain a loan." Court Order page 2.

The events that were allowed are clear. First, again, after checking title on May 15, 2003, Jetmar Properties LLC signed an agreement granting Ortega a first mortgage to secure the $200,000 Ortega had provided and could otherwise start to collect. Trial 155-166; See Mortgage exhibit from Trial; See Wire Transfer exhibit from Trial.

Second, months later foreclosure in December 2003 was started by Ortega with notice being sent to particular parties in the manner set forth in statute. Trial 125-127. Importantly, Stone himself at trial admitted he had notice that action was being taken against the Brooklyn Park property which he later said he supposedly thought he owned. [1] Despite this, Stone did not file any legal action or take any similar action. Trial 58.

Next, and third, a foreclosure sale was held apparently on March 2, 2004, where people could purchase relying based on how title appeared to be, and without any other higher bidders willing to provide money Ortega bid and gave up his claim to $200,000 to purchase the property, which is a separate provision of value. Trial 221-251.

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[1] Stone admitted having notice action was being taken against property he claims he thought he owned. Trial 48-50 (Stone was told "end of December" in 2003 about foreclosure and grace period to redeem); Trial 48 (Stone got letter passed on by tenants from an attorney identifying Ortega as claiming mortgage interest in property and telling renters to no longer pay Stone directly); Trial 54 (Stone went to courthouse for foreclosure papers to figure out things for himself) - (Stone had fears [and therefore knowledge] that his property might be lost); Trial 55 (Stone after notice for "9 more months" got rent until "August 2004" showing 9 months of notice): (Trial "Q: When did you first learn that Mr. Hammond had mortgaged the duplex that you quitclaimed? A: This was the most tragic thing [...] THE COURT: - - excuse me, sir. The last week of December 2003? THE WITNESS: Yes sir."); Trial 87 (Stone told by Hammond "we'll have six months to take care of this."; Trial 88. (Q: [...] did you understand the property to be in foreclosure at this time? A: I didn't understand all the legal details[...]); Trial 142 (Objection sustained on repetitious questioning showing that foreclosure happened and Stone had "either actual or constructive notice.")

Still next, fourth, then the 6 month redemption period occurred, during which time again no action was taken to regain the property or put people on notice of any other claims. This period would have lapsed at least by September 2, 2004, and Ortega like other buyers finally thought and could assume his ownership was secure.

Only after all the above events, did Stone decide to bring suit to put forward claims, by a summons and complaint signed on September 4, 2004 and not served apparently until October 7, 2004. Summons and Complaint of Stone, signed September 4, 2004. As said above, Keith Hammond had a real estate business which Stone worked for. Hammond is now in criminal trouble for his real estate business. Trial 100-103, (testimony of Officer Cory Cardenas, called by Respondent). As Stone himself admitted he was so involved in many, many projects (not just one) as consultant or assistant that he was supposed to be paid $6,000 monthly (which would be $72,000 per year). Trial 59-68,82-84. Stone the one time he met Ortega, was introduced as a member of the board of Jetmar Properties LLC.

In his new claims Stone said, first , as a claim against Hammond for money damages but not against Ortega who he had not dealt with, it was said there was an agreement by Hammond to return the property unencumbered in 2 months. Court Order page 3. This additional agreement about return was never recorded to put people on notice, with Stone knowing this agreement had not been done in writing. Trial 41-42. The District Court found that Hammond fraudulently did not intend to carry out this agreement, however it was not found that Stone did not know he was signing a deed giving away his property that would be recorded. Court Order page 2-4; Trial 79. Stone even further said he knew Hammond needed to appear to have clear title, which Stone assisted with in

getting several old liens cleared to let Hammond appear to hold this. Trial 40, 92-93. The deed was done on May 14, 2003, which deed was left with Hammond for recording who kept it and did not return it to Stone. Trial 45-48. On July 14, 2003, if the 60 day agreement were going to be respected the property should have been taken back by Stone, however Stone took no legal or other action and even continued to work with Hammond, nor did he publicly deny the deed or take similar action. Trial 46.

Stone for his sole claim against Ortega and reason why he should lose the Brooklyn Park property, showed contrary to everyone's expectations and what they all were relying upon that the grantee of the first deed, an LLC, due to late filing of papers by someone was not technically formed until after the deed. Trial 52-55. Articles of Organization for Jetmar were signed on November 13, 2002, but not filed for some unknown reason with the Secretary of State until March 11, 2004, with a Certificate of Organization being granted on March 11, 2004.

As explanation for why Stone would take the actions and risks he did, he was being paid for the 2 months grant of his property. The Court noted, "In exchange, Stone was to receive compensation of various forms, including an interest in a real estate project for which Hammond was seeking the loan." Court Order 3-4. This compensation as Stone admitted was: 15% position in the whole project of 50 condominiums, which assuming $100,000 per unit is a total of $750,000.00 to Stone - - (and there also were 4 retail spaces built), plus he would continue to get all rent but have expenses paid on the property. Trial 39-41; 76. Stone also said more compensation was talked about for his choosing to keep working with Hammond including: a new car, and a 40 acre hobby farm. Trial 39-41; 76.

Stone is 63 years old, has a Bachelors degree, has a Masters degree, and is even certified to teach in high school and junior high school. Trial 29, 30, 32, 64-66, Stone has owned and managed directly rental real estate at least since 1980 and was involved in numerous real estate transactions for Hammond. Trial 29, 30, 32, 64-66. As said above, from being involved with clearing title for Hammond, Stone at least had some knowledge how things must be recorded to give notice to others, and knew that by plan this land would appear to be held in the clear by Hammond.

The District Court in the end after not granting Ortega's counsel's renewed motion for summary judgment or directed verdict after the Plaintiff Stone's case, and after then hearing other evidence, the later ruled (despite Stone's conduct and inaction, and Ortega's lack of knowledge and reliance) that Stone gets back the property.[2] Court Order page 5; Trial 109. The Court concluded "de facto" incorporation treatment is no longer available, therefore the deed was void and no one got anything, and (in a mixed finding of law and fact) Ortega was not a good faith purchaser under the recording statute. Court Order 5.

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[2] The Court focused on de facto incorporation although other issues had been argued throughout the case especially in Summary Judgment before this same District Court. At summary judgment after hearing the several theories at issue the District Court ruled against Stone's motion for Summary Judgment (saying de facto incorporation is possible, which seems to have made the Court later focus on this theory as most important issue and ignore other possible issues). At end of trial, the court did not ask for written findings that would have listed the many issues, although the parties referred to their Summary Judgment memoranda (discussing de facto incorporation, estoppel, and other theories). Raised in the Answer of Ortega were defenses of estoppel, the recording statute, good faith purchaser and reliance of Ortega, waiver, res judicata and Stone's own actions in causing his problems. At trial Ortega's counsel made clear that the Statute of Frauds and verbal agreements were insufficient given land was involved, and the "ridiculousness" of letting parties later come and ask courts to dissolve everything. Trial 189-194, 195.

ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

A reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

Court rulings on mixed questions of law and fact are not binding on an appellate court and are subject to independent review. *Meyering v. Wessels*, 383 N.W.2d 670, 672 (Minn. 1986).

Importantly, a reviewing court need not defer to the district court's application of the law when the material facts are not in dispute. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

The trial court's findings on purely factual issues are erroneous unless reasonably supported by the evidence. *Nunnelee v. Schuna*, 431 N.W.2d 144, 146 (Minn.App. 1988).

II. WHEN TECHNICALITIES ARISE ONE USUALLY IS STILL HELD TO WHAT ONE AGREED TO, SHOULD HAVE EXPECTED, AND OTHERS RELIED ON

Only the surprising technicality of a deed being legally void (but importantly probably equitably and otherwise enforceable) makes us even question what should happen in this case. Normally, one would 100% expect that the person acting like Stone pay when he does not follow the safeguards provided by the recording system, does not record his side agreement to get return of property, does not involve himself in legal action he knows is occurring, and silently lets someone else rely on the first deed when lending money and, also, in later legal proceedings to bid at the sale.

Well, what should law and especially equity do when a technicality is found that raises questions about a transaction? The answer is fairness usually requires you simply hold people to their agreements, and what they should have expected, and led others to expect and rely upon. This is rather than the worse situation, having what no one expected occur with surprising windfalls and unfair loss. So it is normal to usually almost automatically ignore legal technicalities since the alternative is worse and makes no sense.

For purchasers, this principal is of holding people to their words and actions has been written into special statutes or just case law, establishing that purchasers may rely on the appearance of ownership. This is seen as land recording statutes and UCC Article 9 statutes, and, again, just in case law which says it will protect "bona fide purchasers".

For people relying on conducted legal actions, estoppel in some form usually is available to hold people to their words, deeds, and inaction. For example in this case

principles of res judicata and waiver were pled, or as argued at trial it was just "ridiculous" in equity to let someone get away with such inaction. Cases tend to focus on whether those taking legal action followed the rules, and whether those whose interests were involved had some notice so have no good excuse for not taking action. Equity is especially implied when someone relies on a court action and relies, like a bidder at a foreclosure sale.

Let there be no mistake, Stone's whole argument is not what is more fair, or carrying out what people should have expected, or that people bear the consequences they should have expected, or even what is best for the system - - and instead a technicality is focused on and then all further discussion about fairness, common sense, and the effect of such a ruling on the legal system, is asked to stop. This attempt to rely on a technicality without further discussion is claimed despite many legal issues which probably equitably and otherwise make the transactions at issue enforceable, which are discussed below.[3]

Nor is a land transaction seen as "special" and not subject to usual principles of

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[3] The plain ridiculousness of Stone's position is shown by considering what would happen if a "void deed" always simply kept title from passing, and one did not look at issues that bar people from trying to avoid a situation they entered into, like "corporation by estoppel" and equity. Under Stone's theory title could be stuck with any ancient grantor if one years later learns they gave title to entity which had some formation problem. Nor can one simply check with the Secretary of State since a deed is effective when delivered so one would have to track down each old attorney and see when the deed was actually delivered. Even the Title Standards people who specifically know the law of land and deeds well, know those who deal with a company just cannot avoid transactions in land they expected to be binding just because of a technicality "void" deed, and the Title Standards says one need not check the Secretary of State. Minnesota Title Standards, Standard No. 33 Adopted June 28,1946 Amended. Many things lead to void deeds, like lack of consideration, however the usual result is such void deeds will still be enforceable since under equity or other theory people cannot avoid what they agreed to do and what others relied upon.

estoppel and other things that overcome technicalities and make transactions enforceable, as numerous cases show where a "void deed" is still fully enforced so long as any theory is available to overcome a technical defect. *See Willis v. City of Valdez* 546 P.2d 570 Alaska 1976.(saying that although grantee land company was neither a corporation de jure nor a corporation de facto at time of execution of quit-claim deed, the grantor's heirs, being in privity with him, were estopped from denying existence); *Bukacek v. Pell City Farms, Inc.,* 286 Ala. 141, 237 So.2d 851, *cert. den.* 401 U.S. 910, 91 S.Ct. 872, 27 L.Ed.2d 809 (1987)(holding Bukacek is estopped to deny the existence of the corporation at the time he voluntarily executed a deed transferring property to the corporation even though unfiled were the Articles of Incorporation); *See Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Froislie* 37 Minn. 447, 35 N.W. 260 (Minn. 1887)(holding in Minnesota that a corporation de facto, is "capable of taking and holding property as grantee", and conveyances to it will be valid as to all the world, except the state, in direct proceedings to inquire into its right to exercise corporate franchises).

III. DE FACTO INCORPORATION AND DELIVERY OF DEED

The only questions is which of many theories will stop a technicality, here a void deed, from letting people avoid a situation they entered into and let others rely upon. The first theories to be considered are de facto incorporation and the recording statutes, although other issues discussed later are even stronger and more clearly applicable.

Minnesota for over a hundred years has used the doctrine of de facto incorporation to say a void deed can't be avoided just because it is given before technical incorporation. *See Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Froislie*, 37 Minn. 447, 35 N.W. 260 (Minn. 1887)(holding that a corporation de facto, is "capable of taking and holding property as grantee"). A de facto corporation exists when there is: (1) some law under which a corporation with the powers assumed might lawfully have been created; (2) a colorable and bona fide attempt to perfect an organization under such a law; (3) user of the rights claimed to have been conferred by the law. *See Almac, Inc. v. JRH Development, Inc.*, 39 N.W. 2d 919, 924 (Minn.App. 1986).

To overcome a hundred years of case law and such a basic doctrine, one would think one would need some or at least "one" word in a statute. This is not present and we have instead after 1981 when the corporation statutes found in Chapter 302A were remodeled after the Model Business Corporations Act, the Reporter <u>after</u> the statutes were drafted put in the comments he copied from the comments to the Model Act saying de facto incorporation would no longer be available under the Model Act. *Minn.Stat. Ann.* §§ 302A.153, Comments. If one did not have the Annotated Statutes with Comments, as

some people don't especially those who look up Minnesota law online including the Minnesota revisor's website, one would have not one word that "de facto incorporation" after 100 years was being abolished.

Forgotten also was that the Model Business Corporations Act is a "model act" and not a "uniform act" where interpretation need not be uniform at all, and states are free to vary. Furthermore in this case this Jetmar is a LLC under Chapter 332B which does not have any Reporter notes undoing "de facto corporations". See Minn.Stat.Ann. 322B.175, Notes (saying blankly LLC statute is based on corporation statute, 302A.153, not saying the LLC Chapter is undoing de facto incorporation). The rest of the LLC Chapter 332B is drawn from many sources, so it is not a model act even and one cannot assume how it is meant to function overall such that one can fill in what is not mentioned. Many Minnesota entities have different rules about transactions before formation, so there is no uniform approach one can assume was meant. *See, e.g.,* Minn.Stat. s 308A.145 Amendment of articles to incorporate defectively organized cooperative: (saying de facto incorporation for associations is automatically given if defects are corrected). Even after 1981 even Minnesota corporation cases continued to mention de facto incorporation. *See Almac, Inc. v. JRH Development, Inc.,* 39(N.W. 2d 919,924 (Minn. App. 1986)(saying "The law gives equal recognition to de facto corporations."); *Ross v. Briggs & Morgan,* 520 N.W.2d 432,436-37 (Minn. App. 1994) (supposing that a de facto corporation may have existed when an individual was in the process of incorporating). However, to be honest it may be de facto corporation is no longer available, as the Court in *Warthan v. Midwest*

Consolidated Insurance Agencies, Inc. seemed to hold. *Warthan v. Midwest Consolidated Insurance Agencies, Inc.*, 450 N.W.2d 145, 147-48 (Minn. Ct. App. 1990).

But, importantly, as almost a separate grounds, here there was a "deed" which unlike a contract is not triggered until "delivered" so this transaction could await the formation of a proper entity and then delivery could occur.

A deed must be delivered before any title can transfer. *Slawik v. Loseth*, 207 Minn. 137, 139, 290 N.W. 228, 229 (1940); *Community Credit Union Services, Inc. v. Federal Exp. Services Corp.*, 534 A.2d 331 (D.C.,1987) (saying deed conveying property to an incipient "corporation" that has not yet been incorporated, passes title to corporation as of time of incorporation); *White Oak Grove Benevolent Society v. Murray,* 145 Mo. 622, 47 S.W. 501 (1898) (equitable rights may result in favor of a subsequently formed corporation named as a grantee).

Turning to the facts in this case, unlike many cases where a corporation was never formed, here an LLC was eventually formed and operated. Unlike many cases where no one did any paperwork, here papers were done and signed. Unlike other cases, here people both insiders and outsiders did always consider the entity as being a LLC, when discussing it and when doing business. The only failure was some unknown person's failure to mail in papers to the Secretary of State which, again, was corrected. Correction of this defect was done in time, with papers filed before anyone objected or any consequence occurred from not filing. Ortega the person asking that people not deny there was a corporation as they all expected, is a third party clearly not at fault for not filing papers. Overall, de facto

incorporation appears supported, especially for Ortega a third party, who relied on how Hammond and Stone operated the Jetmar Properties business. De facto incorporation is supported because there was (1) some law under which a corporation with the powers assumed might lawfully have been created; (2) a colorable and bona fide attempt to perfect an organization under such a law; (3) people claimed to have the rights (of incorporation) conferred by the law.

Also in this case since, again, here we were dealing with a deed. Certainly even at the time the LLC officially came into existence March 11, 2004, Stone had not indicated he wanted to undo the transfer and was not still in favor. Even during foreclosure he did not come forward and deny the deed. Stone at trial admitted he left the deed with Hammond and it was not returned to Stone even after recording. Hammond was an agent of the LLC so when the LLC delivery of the deed would have occurred to Hammond as agent. Stone at the time the LLC officially formed was continuing to work with Hammond, and even if the deed could have been considered ineffective due to lapse of time Stone's actions and continued work with Hammond even after learning of Hammond's alleged improper actions would have ratified events.

IV. RECORDING STATUTES WHOLE FUNCTION IS TO PROTECT THOSE WHO RELY ON APPEARANCE OF TITLE

A completely separate possible grounds for holding people to what they expected is the recording statutes, which tell people to not expect their interests to be protected unless they record them. "Under the recording act, a purchaser in good faith [who will be protected] is one who gives consideration without actual, implied or constructive notice of the inconsistent outstanding rights of others." *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989). "The purpose of the recording act is to protect those who purchase real estate in reliance upon the record." *Miller*, 438 N.W.2d at 69. Given this language, one would fully expect the recording statutes to protect Ortega, who relied on the appearance of title exactly as he should.

The District Court appears to have decided, first, since "de facto" incorporation wasn't found supported it would treat as void the deed without looking at other theories (like estoppel). After concluding the deed was void the Court seemed to assume Ortega was not a purchaser since it felt there was nothing to buy. For reasons given below, this may be incorrect. But second, it appears the District Court maybe felt there was a loophole in the recording statute which appeared to say only completely unrecorded parties are hurt, and in this case Stone was recorded in the land records albeit with an interest he disavowed in the quitclaim deed. How the recording questions should function is a legal question.

Minn.Stat. s 507.34 says,

> "Unrecorded conveyances void in certain cases Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of

> the same real estate, or any part thereof, whose conveyance is first duly recorded[.] (emphasis added)

Stone may argue this seems to say only interests totally not recorded are hurt - - and the fact he quit claimed away his interest is irrelevant under the statute. One may not interpret a statute to lead to an absurd result like this. *See* Minn. Stat. § 645.17(1). What good are title records if this rule is followed, than anyone with past title need not record their other claims - - past grantors would have to be "interrogated" to make sure they meant the grant and transfer they made. This is not stated as required, by any statute.

Importantly, Minnesota in *Proulx v. Hirsch Bros. Inc.* ruled exactly that appearing to give away one's interest will be held against one, so it appears the argument of Stone is not proper and the land recording statutes will protect someone who relies on the appearance of title like Ortega. See *Proulx v. Hirsch Bros. Inc.* 279 Minn. 157, 155 N.W.2d 907, (Minn. 1968)(party who quit claimed interest away could not prevail against bona fide purchaser). Ortega relied on the appearance of title, and was not unreasonable for not guessing a prior grantor despite a quit claim deed was not quitting some claims, and he should be protected.

Furthermore, basically Stone is trying to have followed the side agreement for return of the property <u>that was not recorded</u>. Both the parol evidence rule and the Statute of Frauds also say one cannot have unwritten agreements about land, yet that is just what Stone wants to do.

Lastly, to fall under the recording statute as a "bona fide purchaser" is usually not difficult, just some value must be given and one must be without notice of opposing claims.

Anderson v. Graham Inv. Co., 263 N.W.2d 382, 384 (Minn. 1978); *Miller v Hennen*, 438 N.W.2d 366, 369 (Minn. 1989); *Claflin v. Commercial State Bank*, 487 N. W.2d 242,247-248 (Minn.App. 1992). Concerning whether Ortega gave value, in this case Ortega clearly gave $200,000 which in exchange for a mortgage he kept extended and did not collect, and in fact he eventually lost this money. This is sufficient for value. *Gartner v. Western Elevator Co.* 104 Minn. 467, 116 N.W. 945 (Minn. 1908) (saying past indebtedness is sufficient consideration to sustain a mortgage given to secure it); *Westbrook State Bank v. Anderson Land and Cattle Co.* 364 N.W.2d 416 (Minn. 1961) (same). Furthermore Ortega gave even more value since at the foreclosure sale his $200,000 claim was bid away.[4]

Concerning whether Ortega lacked notice, since Stone never really talked to Ortega he was not on notice of any rights Stone claimed. Also, as said, with a quit claim deed anyone would think any claim is being ended. This was all Ortega knew. Was Ortega to think Stone in signing under oath before an notary a quit claim deed giving up all rights to the property was lying? The District Court noted this in the Summary Judgment Order, saying: "Plaintiff has proffered no evidence to the Court that Ortega was anything other than a purchaser in good faith or that Ortega had or should have had any form of notice,

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[4] When a mortgagee is the successful bidder at the sale, under a bid equaling the full amount of its debt and the expenses allowable under statute, the parties' prior debtor-creditor relationship is extinguished. *Evans v. Rhode Island Hospital Trust Co.,* 67 Minn. 160, 163, 69 N.W. 715, 716 (1897); *Carnel v. Travelers Ins. Co.,* 402 N.W.2d 190, 192-3 (Minn.App.1987); *In re Klein,* 9 F.Supp. 57, 59 (D.Minn.1934).This follows from the fact that a sale for the full amount of the indebtedness extinguishes the mortgage debt. *Cross Cos., Inc. v. Citizens Mortgage Investment Trust,* 305 Minn. 111, 119, 232 N.W.2d 114, 119 (1975); *Gardner v. W.M. Prindle & Co.,* 185 Minn. at 150, 240 N.W. at 352; *Carlson v. Presbyterian Board of Relief,* 67 Minn. 436, 439, 70 N.W. 3, 4 (1897).

whether actual or implied." Summary Judgment Order page 5. It is not enough that Ortega was too trusting and should have wondered if Hammond was good to his word, Ortega took Stone at his word and his deed.

IV. ESTOPPEL, INCLUDING CORPORATION BY ESTOPPEL, IS BROAD POWER BARRING TECHNICAL ISSUES FROM EVEN BEING RAISED TO UNFAIRLY AVOID A SITUATION

A person who enters into a contract with another acting as a corporation under the doctrines of estoppel and corporation by estoppel cannot even raise the question of whether an entity was a proper corporation. *See State v. Rivers* 206 Minn. 85, 287 N.W. 790 (Minn. 1939). Minnesota has directly ruled that estoppel to raise the issue of proper formation will be followed in land transactions. *Northern Bldg. & Loan Sass's v. Withered,* 205 Minn. 413, 286 N.W. 397 (Minn. 1939) (when someone gives a mortgage in real estate which is later sought to be enforced, they are "estopped in a suit to foreclose a mortgage from setting up that it was not a corporation because the law was not fully complied with in its organization.").

Many cases follow this position. *See e.g., Willis v. City of Valdez* 546 P.2d 570 Alaska 1976)(saying although grantee land company was neither a corporation de jure nor a corporation de facto at time of execution of quit-claim deed, the grantor's heirs, being in privity with him, were estopped from denying existence); *See Bukacek v. Pell City Farms, Inc.,* 286 Ala. 141, 237 So.2d 851, cert. den. 401 U.S. 910, 91 S.Ct. 872, 27 L.Ed.2d 809 (1965)(saying Bukacek is estopped to deny the existence of the corporation at the time he voluntarily executed a deed transferring property to the corporation even though unfiled

were the Articles of Incorporation); *City of Orange Beach v. Perdido Pass Developers*, Inc. 631 So.2d 850 (Ala.,1993)(saying despite city's contention that developer had no title to island because developer was not incorporated, such is insufficient); *White Oak Grove Benev. Soc. v. Murray* 145 Mo. 622, 47 S.W. 501 Mo. 1898. (saying, "It has also been held in a number of well-considered cases that where a grantor deals with the members of a corporation by their corporate name, receives their money as of said corporation, and undertakes to convey land to said company in its corporate name, said grantor will be forever afterwards estopped from denying the validity of the corporation, or its power to receive a grant.")

Minnesota has exactly ruled that estoppel in some form to deny a deed will be followed, which was put in terms of protecting a "bona fide purchaser" against someone who appeared to have given away their interest. In *Proulx v. Hirsch Bros. Inc.* 279 Minn. 157, 155 N.W.2d 907 (Minn. 1968), the Minnesota Supreme Court said:

> "Rescission and restoration will not be granted to the prejudice of bona fide purchasers acquiring rights subsequent to the execution of the instrument sought to be canceled. ... Defendants Thorpe and Gesme were correctly found to be bona fide purchasers. ... We think it clear that under the evidence herein both plaintiffs and the other defendants are estopped from asserting any claims in opposition to rights acquired by defendants Thorpe and Gesme through their good-faith purchase of this property. ... Plaintiffs are estopped by reason of the fact that they gave a quitclaim deed and assignment of their interest, without qualification, to Construction Company and simultaneously therewith surrendered and delivered possession to it. Hershey is estopped from asserting any claim based on the transfer to it on January 17, 1966, from Construction Company by reason of the fact that no consideration was paid and, according to Hirsch's testimony, it was intended to be merely a 'within corporation transaction.'" (underlining added).

Importantly, in *Esty v. Cummings*, the Minnesota Supreme Court also considered what to do in a case somewhat similar to the one here, and decided a mortgagee gave value and

would be protected. *Esty v. Cummings,* 80 Minn. 516, 518, 83 N.W. 420, 421 (1900) (saying persons are estopped from denying the rights of plaintiff, who had "loaned the money to [the individual], taking the mortgage in question in good faith, and in the belief that [the individual] owned the property"). It is honestly not known if Stone has any argument against estoppel and corporation by estoppel from applying.

Now, the District Court may have skipped over considering issues like equity and corporation by estoppel because it mistakenly thought such theories were revoked by the revocation of "de facto incorporation" by the Model Business Act. This is understandable, but is incorrect. As was said when looking at Minnesota law after the Model Act, in *Arbo Corp. v. Aidan Marketing/Distribution, Inc.* 639 F.Supp. 1512, D.Minn.,1986:.

> "Finally, plaintiff argues that Minnesota's adoption of the Model Business Corporation Act in 1981 eliminated the doctrine of de facto corporations. *Minn.Stat.* §§ 302A.153 and 302A.155 state that corporate existence begins when articles of incorporation are filed with the Secretary of State. Although this may eliminate the de facto doctrine in Minnesota, it does not necessarily affect the viability of an estoppel defense. [...] notes to § 302A.153 specifically state that "[t]he defense of estoppel has nothing to do with the efficacy of an attempted corporation, and may apply even where no documents have been filed with the Secretary of State." 20 *Minn.Stat.Anno.* 280 (1985). *See also* Timberline Equipment Co. v. Davenport, 267 Or. 64, 514 P.2d 1109, 1111, n. 1 (Or.1973). [In considering the effect of a provision comparable to *Minn.Stat.* § 302A.155 on the doctrines of incorporation de facto and by estoppel, the court found that estoppel is a distinct and independent theory from de facto incorporation.]"

Other cases follow this argument, and even the Model Act's own notes stress that the doctrine of corporation by estoppel does survive the MBCA because it "has nothing to do with the efficacy of the attempted incorporation." Minn.Stat.Ann. s 302A.153 Comments; 8 *Fletcher, Cyclopodia of Corporations* § 3857 , 3889 (Perm. Ed.1992)(saying, "Apparently, estoppel can arise whether or not a de facto corporation has

come into existence, since the doctrine of de facto corporations has nothing to do with the principle of estoppel, the only effect of an estoppel being to prevent the raising of the question of existence of a corporation."); Wayne N. Bradley, Comment, *An Empirical Study of Defective Incorporation,* 29 Emory L.J. 523, 529, 533-34 (1990) (noting that if a de facto corporation does not exist, a court can still find a corporation by estoppel); *Bukacek v. Pell City Farms, Inc.*, 286 Ala. 141, 237 So.2d 851, cert. den. 401 U.S. 910, 91 S.Ct. 872, 27 L.Ed.2d 809 (1971)("Corporations by estoppel are not based upon the same principles as corporations de facto. The doctrine of de facto corporations has nothing to do with the principle of estoppel. In fact, a corporation de facto cannot be created by estoppel, the only effect of an estoppel being to prevent the raising of the question of the existence of a corporation.").

Minnesota sources also make clear corporation by estoppel has not been eliminated, but can be used to bar persons from raising the issue of whether a corporation was properly formed at some time. *Ross v. Briggs and Morgan*, 520 N.W.2d 432 (Minn.App. 1994); *Almac, Inc., v. JRH Dev., Inc.*, 391 N.W.2d 919 (Minn.App. 1986); 18 *Minnesota Practice* s 2.3 Defective Formation (saying corporation by estoppel survives and may be used not let parties even raise issue of whether corporation was properly formed).

Lastly, one may ask: <u>what does equity say when fraud was involved in causing someone to do a deed, and doesn't the fraud of Hammond affect the deed?</u> Although one may feel sorry for someone who lets themselves be tricked, cases are clear that a deed will only be ignored if a person did not even know the document they were signing was even a deed. As cases have said, "If a grantor is aware that the instrument he is executing is a

deed and that it will convey his title, but is induced to sign and deliver by fraudulent misrepresentations ··· [it] can be relied upon and enforced by a bona fide purchaser." *Fallon v. Triangle Management Services, Inc.,* (1985) 169 Cal.App.3d 1103, 1106; *see Schiavon v. Arnaudo Brothers 84 Cal.App.4th 374, 378.* Mere fraudulent promises like Hammond's in this case are not enough to overcome the act of someone knowingly signing a deed giving away their property that will be recorded and relied on by others. *Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc.* 59 F.Supp.2d 398 (D.N.J. 1999)(saying even corporate agent intentionally misrepresenting incorporation insufficient to let third party ignore company it thought existed).

Turning to the facts in this case, Stone clearly knew he was signing a deed which he knew and planned would be recorded and relied upon by lenders and others, but still he went forward anyway and intentionally gave his interest away. Overall, in this case all parties relied upon there being an entity and made their agreements and took their actions based on this, it is completely against equity to let parties now suddenly deny things should happen because of the technically void deed. What parties expected and risked should happen.

VI. ONE CANNOT JUST WATCH, WAIT, AND LATER ATTACK EVENTS AND TRANSFERS ESPECIALLY AFTER PURCHASERS AND BIDDERS RELIED

As was said at trial, it is just ridiculous that Stone can in December 2003 know about Ortega's mortgage claim and action against property Stone says he thought he owned, know about the foreclosure action, know about the sale where someone will rely on things

and purchase, know of the 6 month redemption period and time to object, and take zero legal action and only afterward act.

Minnesota has already ruled one cannot do nothing while land you have an interest in is being disposed of. In 1910 the Minnesota Supreme Court explained:

> [i]f one has a claim against an estate, and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not afterwards be allowed to assert his claim against the purchaser. And justly so, because the effect of his silence has actually misled and worked harm to the purchaser.

Macomber v. Kinney, 114 Minn. 146, 156-57, 128 N.W. 1001, 1004 (1910). This remains, as recently as 3 years ago, clear Minnesota law. In *Alexander v. DaimlerChrysler Services North America, L.L.C.*, 2003 WL 22183564 (Minn.App. 2003) after a foreclosure a claim was presented, and the Court said:

> Alexander [Stephen's husband] claims that his company deeded the property to Stephens by unrecorded warranty deed on May 22, 1989, and that Stephens, on that same day, deeded a "50% joint tenancy interest" back to Alexander.... After concluding that Alexander's claims were barred under the doctrines of collateral and equitable estoppel and merger and bar, the district court granted summary judgment... ... Even assuming the validity of his claimed interest in the property, however, Alexander's failure to assert that interest and intervene in the original foreclosure action estops his current claims. Equitable estoppel arises when "one by his ··· silence when he ought to speak, intentionally or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced and in such a matter that if the former is permitted to deny the existence of the facts it will prejudice the latter." *Gresser v. Hotzler*, 604 N.W.2d 379, 385 (Minn.App.2000) (quoting Transamerica Ins. *Group v.. Paul*, 267 N.W.2d 180, 183 (Minn.1978)).

Numerous Minnesota and other cases make clear one must act sooner, and cannot do nothing during the foreclosure and during the redemption period. Such lack of action

when one had notice (as Stone admitted he did) has no excuse especially when third parties rely, as Ortega did by purchasing the property for his claim to $200,000, or even Ortega could have someone else buy so gotten some from the auction so he really has lost rights or even money by people making him think he should big away his claim to get the property. Stone should in these circumstances not be allowed to bring claims as late as he did, after he knew things would already be resolved in other action and knew people would have relied on these things.

Numerous Minnesota and other cases say one cannot act too late for equitable and also for statutory reasons involving foreclosures requiring action before the redemption period lapses at least under previous versions of statutes. *See Prior Lake State Bank v. Mahoney,* 298 Minn. 567, 568-69, 216 N.W.2d 681, 682 (1974) (saying claimed irregularity in foreclosure proceeding asserted after period of redemption was impermissible collateral attack); *Uptown Federal Sav. & Loan Ass'n of Chicago v. Walsh* 15 Ill.App.3d 626, 305 N.E.2d 74 Ill.App. (Ill. 1973); 55 Am.Jur.2d Mortgages § 716 (2003), *Collateral attack* ("The general rule that a judgment or decree is not subject to collateral attack if the court had jurisdiction of the parties and of the subject matter is applicable to decrees of foreclosure."); *Browning v. Browning,* 246 Minn. 327, 331, 76 N.W.2d 100, 103 (1956) (saying "Where the holder of the mortgage has gone into possession as 'mortgagee in possession,' and so remains (the mortgage being unpaid) until the right of action to redeem is barred, he becomes vested with an absolute legal title to the mortgaged premises.' Rogers v. Benton, 39 Minn. 39, 45, 38 N.W. 765, 769; 12 Dunnell, Dig. (3 ed.) s 6242."); *Nussbaumer v. Fetrow,* 558 N.W.2d 595, 599 (Minn.App.

1996) ("Minnesota law does not permit the collateral attack of a judgment valid on its face."); Bankruptcy Case, 112 B.R. 304 (B.R. 1980) ("The former mortgagee is now a purchaser; though its rights in the subject property are subject to defeasement via redemption by the mortgagor or by junior lien holders, upon the expiration of redemption periods they will ripen to perfect title. *Hokanson v. Gunderson*, 54 Minn. 499, 503, 56 N.W. 172, 173 (1893); *In re Klein*, 9 F.Supp. at 59."); *Abbot v. Peck*, 29 N.W. 194 (Minn. 1886)(saying action after redemption period too late).

Lastly, waiver which was argued clearly bars late action. The basic question in applying the doctrine of waiver or similar laches is "whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant" the requested relief. *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn.App. 1996). In this case prejudice to others would result if Ortega who kept money loaned thinking he had collateral lost that money rather than collecting it, and clearly Ortega was prejudice by him being allowed to bid away his claim to $200,000 by Stone watching and being silent about any claim that he really owned the property. The reason for not acting by Stone is not lack of any knowledge, so Stone really has no good excuse. Conduct like this, which hurts third parties, is not correct and what should be rewarded at the cost of harm to someone else.

CONCLUSION

What factually happened in this case is simply not really in dispute and the Court of Appeals is left to decide what relief to grant given what people did, and what people did not do. Were it not for the news that surprised everyone (that the LLC was not technically formed when the deed were given) we would not even be considering what to do, what is fair, and supports the needs of the land recording and mortgage foreclosure system. Equity and established case law provide many, many grounds for not letting someone use a surprising technicality to avoid a situation they entered into, or sit by and watch legal action occur and people rely and then later try to undo such things. Finally, one can ask if things had gone well would Stone have hesitated to argue that people could not avoid the situation they expected and voluntarily entered into, and that he should get paid.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).