

NO. A05-1450

State of Minnesota
In Court of Appeals

Darrell T. Peterson,

Respondent,

v.

Arthur B. Johnson and Mary Ann Johnson,

Appellants.

APPELLANTS' BRIEF

Gary A. Van Cleve (#156310)
Molly Mc Kee (#341885)
LARKIN HOFFMAN DALY
& LINDGREN LTD.
7900 Xerxes Avenue South
1500 Wells Fargo Plaza
Minneapolis, Minnesota 55431
(952) 835-3800

Attorneys for Appellants

John M. Gassert (#33716)
RUDY, GASSERT, YETKA
& PRITCHETT, P.A.
123 Avenue C
Cloquet, Minnesota 55720
(218) 879-3363

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE.....1

FACTS1

ARGUMENT3

I. THE DISTRICT COURT ERRED BY DETERMINING ON SUMMARY JUDGMENT THAT THE CONVEYANCE FROM THE PETERSONS TO THE JOHNSONS CONSTITUTED AN EQUITABLE MORTGAGE.....4

 A. The District Court Erred in Granting on Summary Judgment Peterson’s “motion demanding . . . foreclosure” and His Motion for the Application of Minn. Stat. § 541.03 as the Statute of Limitations in this Action.4

 B. The Limitation on Actions Found in Minn. Stat. § 559.19 is the Applicable Statute of Limitations on an Action to Have an Equitable Mortgage Declared; Under this Statute, the Time for Peterson to Bring an Action has Also Expired.6

 C. Even if the Limitation Period for Peterson’s Action Had Not Expired, the District Court Erred in Granting Summary Judgment in Favor of Peterson Because Peterson Failed to Prove that the Conveyance of the Property Constituted an Equitable Mortgage.9

 1. The district court erred by relying on an ambiguous agreement executed several months after a conveyance absolute on its face, in concluding that the conveyance was an equitable mortgage.9

 2. The district court erred by failing to apply the proper burden of proof in concluding that the conveyance absolute on its face was an equitable mortgage.12

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky, 674 N.W.2d 176 (Minn. 2004)..... 10

Broek v. Park Nicollet Health Servs., 660 N.W.2d 439 (Minn. App. 2003) 3

DeMars, 256 N.W.2d at 501 5

Durgin v. Stevenson, 192 Minn. 526, 257 N.W. 338 (1934) 12

Empire State Bank v. Devereaux, 402 N.W.2d 584 (Minn. App. 1987)..... 10

Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993)..... 3

Harvet v. Unity Medical Ctr., Inc., 428 N.W.2d 574 (Minn. App. 1988) 3

Hermeling, 548 N.W.2d at 270 5

Johnson v. Winthrop Labs. Division of Sterling Drug, Inc., 190 N.W.2d 77 (Minn. 1971) 6

Lamb Plumbing & Heating Co. v. Kraus-Anderson of Minneapolis, Inc., 296 N.W.2d 859 (Minn. 1980) 10

Ministers Life, 307 Minn. at 138, 239 N.W.2d at 210 9, 10

Nash v. Wollen, 656 N.W.2d 585 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003) 7

Nitkey v. Ward, 199 Minn. 334, 271 N.W. 873 (1937), *cert. denied* 302 U.S. 706 (1938)..... 12

Pfizer, Inc. v. Int’l Rectifier Corp., 538 F.2d 180 (8th Cir. 1976)..... 4, 10

St. Paul Mercury Indem. Co. v. Lyell, 216 Minn. 7, 11 N.W.2d 491 (1943)..... 10

State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) 3

Weeks v. Am. Family Mut. Ins. Co., 580 N.W.2d 24 (Minn. 1998)..... 3

Westburg v. Wilson, 185 Minn. 307, 241 N.W. 315 (1932) 10

White Motor Co. v. United States, 372 U.S. 253, 83 S. Ct. 696 (1963) 4, 10

Statutes

General Statutes of Minnesota 1923, § 9575 7

Minn. Stat. § 541.03.....	4, 5, 6, 13
Minn. Stat. § 541.05.....	5
Minn. Stat. § 559.01.....	3, 5
Minn. Stat. § 559.18.....	6, 7, 8
Minn. Stat. § 559.19.....	6, 7, 8
Minn. Stat. § 559.20.....	7
Minn. Stat. § 645.16 (2004).....	7
Minnesota Statutes 1927, § 9573	8

Other Authorities

Black’s Law Dictionary (7th ed.) at 1279.....	11
---	----

STATEMENT OF THE CASE

This appeal originates from the judgment of the district court dated May 23, 2005, which determined that the November 1, 2004, order and memorandum of the court, granting in part and denying in part the parties' cross-motions for summary judgment, constituted the Final Judgment of the court. The November 1, 2004, order and memorandum determined that, *inter alia*, (a) Arthur B. and Mary Ann Johnson ("Johnsons") had merely an equitable mortgage in the real property which was at the heart of the dispute, (b) the statute of limitations governing foreclosure actions had not run on the Johnsons' right of foreclosure, and (c) no genuine issues of material fact precluded summary judgment. The Johnsons appeal the determinations of the district court and request that this court reverse the partial grant of summary judgment in favor of Plaintiff Darrell T. Peterson ("Peterson") and either (a) order summary judgment in favor of the Johnsons, or (b) remand the case for trial because there are genuine issues of material fact that preclude summary judgment.

FACTS

This action concerns the conveyance of raw land located in the counties of Carlton and Pine, Minnesota (the "Property"). By warranty deed dated September 4, 1986, and acknowledged on September 23, 1986, Peterson and his then-wife Kathleen D. Peterson conveyed the Property to Peterson's uncle and aunt, the Johnsons. A.A. 1. Several months after this conveyance—on December 5 and 15, 1986—the Petersons and the Johnsons executed and acknowledged a separate agreement (the "Agreement") granting the Petersons an option to repurchase the Property from the Johnsons if the Petersons adhered to specific, enumerated repurchase terms. A.A. 3.

The relevant terms of the Agreement are ambiguous—supporting both an interpretation that the amount the Johnsons paid for the Property was a loan that had to be repaid and that the

amount was in consideration for the purchase of the Property, with an option for the Petersons to repurchase the Property from the Johnsons. A.A. 3. The Agreement provided that the Johnsons would “reconvey” the Property to the Petersons if the Petersons paid the sum of \$9,500.00 to the Johnsons in five annual installments of principal and interest.¹ The Agreement provided further that all payments had to be made by November 1, 1991. *Id.* From the time of the conveyance by warranty deed in September 1986, through the execution and acknowledgment of the Agreement in December 1986, and until Peterson instituted the action in 2003, the Johnsons intended and believed that the transaction between the parties constituted a sale of the Property with an option by the Petersons to repurchase the Property pursuant to the terms of the Agreement. A.A. 7.

Peterson failed to make the payments under the Agreement and, in fact, made only one payment of \$3,200 in 1991, the final year of the Agreement. Peterson does not dispute that he failed to make the required payments under the Agreement. In 1996, after having received only one of the required payments from Peterson, the Johnsons recorded with the county recorder the warranty deed that was executed by the parties in 1986. A.A. 8. Upon the recording, the Johnsons paid all delinquent real estate taxes levied against the Property. A.A. 12.

Seven years later, in October 2003, Peterson commenced this action against the Johnsons. Among other things, Peterson demanded judgment that the Johnsons’s interest in the Property was:

An equitable mortgage that may be foreclosed only by action; and that the [Johnsons] are adjudged and decreed to have no right, title, estate, lien or interest in [the Property] or any part thereof other

¹ The Johnsons hired Stanford Dodge of the law firm Dodge, Warp & Brandberg to draft the Agreement so that it would comply with all applicable laws. Dodge drafted the Agreement and also consulted a local bank to determine the rate of interest that could lawfully apply in the transaction. Ultimately, the Agreement provided for interest at a rate of 11% per year.

A.A. 11.

than that of an equitable mortgage, and upon proof of payment by [Peterson] of the balance due on said mortgage, that within 10 days [the Johnsons] shall execute and deliver to [Peterson] a quit claim deed extinguishing any rights they may have in [the Property].

The demand of Peterson does not specifically state the grounds upon which he is entitled to relief; but because the Johnsons recorded the deed to the Property in 1996, they are the fee simple owners of record. Any claim to the Property by Peterson can only be characterized as an adverse claim under Minn. Stat. § 559.01.

ARGUMENT

Standard of Review

On appeal from a grant of summary judgment, the appellate court inquires: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its interpretation of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The appellate court reviews the evidence in the light most favorable to the party against whom judgment has been granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The court on review must resolve any doubt as to whether there is a genuine issue of material fact in favor of concluding that a fact issue exists. *Harvet v. Unity Medical Ctr., Inc.*, 428 N.W.2d 574, 578 (Minn. App. 1988). Additionally, this court will conduct a de novo review to determine the accrual of the cause of action and the running of the statute of limitations. *Broek v. Park Nicollet Health Servs.*, 660 N.W.2d 439, 441 (Minn. App. 2003) (citing *Weeks v. Am. Family Mut. Ins. Co.*, 580 N.W.2d 24, 26 (Minn. 1998)).

Summary judgment is a “blunt instrument” that should be employed “only where it is perfectly clear that no issue of fact is involved. . .” *Id.* Additionally, “Summary judgment is notoriously inappropriate for determination of claims in which issues of *intent*, good faith, or other subjective feelings play dominant roles.” *Pfizer, Inc. v. Int’l Rectifier Corp.*, 538 F.2d 180,

185 (8th Cir. 1976) (citing *White Motor Co. v. United States*, 372 U.S. 253, 259, 83 S. Ct. 696, 700 (1963)) (emphasis added). As fully argued below, intent is the central issue in determining whether an equitable mortgage exists, making the issue particularly unsuitable for resolution on summary judgment.

I. THE DISTRICT COURT ERRED BY DETERMINING ON SUMMARY JUDGMENT THAT THE CONVEYANCE FROM THE PETERSONS TO THE JOHNSONS CONSTITUTED AN EQUITABLE MORTGAGE.

A. The District Court Erred in Granting on Summary Judgment Peterson’s “motion demanding . . . foreclosure” and His Motion for the Application of Minn. Stat. § 541.03 as the Statute of Limitations in this Action.

In both his Complaint and his Motion for Summary Judgment, Peterson requested that the district court determine that the Johnsons’ right to the Property was “[A]n equitable mortgage that may be foreclosed only by action” and that the limitation on actions found in Minn. Stat. § 541.03 was the appropriate statute of limitations for any action by the Johnsons to foreclose on the Property. Because Peterson’s action is one to determine adverse claims to property, and because the applicable limitation on actions for this claim has expired, Peterson’s claim against the Johnsons is time-barred; accordingly, summary judgment by the district court in favor of Peterson was error.

Although Peterson couched his argument on summary judgment in terms of a demand that the Johnsons’ ownership interest in the Property be described as an equitable mortgage, his claim must be characterized as an action to determine adverse claims to the Property. At the time Peterson brought his action in October 2003, the Johnsons had recorded the warranty deed and had been fee owners of the Property for the prior seven years. A.A. 8. Peterson’s action collaterally attacks the Johnsons’ fee simple ownership of the Property. Peterson claims that he, a party with no recorded interest in the Property, is the fee owner and that the Johnsons, who hold title of record, are not the fee owners. Peterson’s claim is therefore more properly classified

as an action to determine adverse claims and is governed by the requirements and limitations of Minn. Stat. § 559.01 (action to determine adverse claims).

Minn. Stat. § 559.01 provides that,

Any person in possession of real property personally or through the person's tenant, or any other person having or claiming title to vacant or unoccupied real property, may bring an action against another who claims an estate or interest therein, or a lien thereon, adverse to the person bringing the action, for the purpose of determining such adverse claim and the rights of the parties, respectively.

Even if the district court had applied Minn. Stat. § 559.01 to determine that the Johnsons's interest in the Property was that of an equitable mortgage (which it did not), it failed to apply the proper limitation period for a claim to determine adverse claims in land.²

Because the claim brought by Peterson sought a determination of his adverse claims to the Property owned in fee simple by the Johnsons, the applicable statute of limitations is Minn. Stat. § 541.05 (six-year statute of limitations for claims arising from a liability created by statute). Minn. Stat. § 541.05 provides that actions based upon a liability created by statute shall be commenced within six years of accrual or such actions are barred. Here, the limitation on Peterson's action accrued in 1996, when the Johnsons recorded the warranty deed conveying title to the Property with the county recorder. More than six years elapsed from the time the Johnsons recorded the deed until the time Peterson filed this action seeking a determination of his adverse claim to the Property. Because Peterson failed to commence his action timely, it is barred by the applicable statute of limitations found in Minn. Stat. § 541.05. *See Hermeling*, 548 N.W.2d at 270; *DeMars*, 256 N.W.2d at 501; *Johnson v. Winthrop Labs. Division of Sterling Drug, Inc.*,

² Instead, the district court applied Minn. Stat. § 541.03 to determine that the Johnsons still had a right of foreclosure—a claim that the Johnsons had neither asserted nor pursued.

190 N.W.2d 77 (Minn. 1971) (holding that courts may not modify or extend a limitations period prescribed by statute).

The district court therefore erred in denying summary judgment to the Johnsons on their affirmative defense that Peterson's claim was time-barred. This court should reverse the determination of the district court and grant the Johnson's motion on summary judgment that the applicable six-year statute of limitations for Peterson's action has expired.

B. The Limitation on Actions Found in Minn. Stat. § 559.19 is the Applicable Statute of Limitations on an Action to Have an Equitable Mortgage Declared; Under this Statute, the Time for Peterson to Bring an Action has Also Expired.

As stated earlier, the district court erred in adopting Peterson's characterization of the issue presented in terms of the Johnsons' right to foreclose a mortgage; the action is more properly characterized as an action to determine Peterson's adverse claim to the Property. But even if the Johnsons had not recorded the warranty deed to the Property in 1996, and Peterson still had a viable claim to have the transaction determined to be an equitable mortgage, the limitation on actions to have an equitable mortgage declared pursuant to Minn. Stat. § 559.18 has run and this claim is also time-barred.

The district court applied the limitations period found in Minn. Stat. § 541.03 as the applicable statute of limitations in this action. A close review of Minn. Stat. §§ 559.18 and .19 reveals that the applicable limitation on actions to have a transaction declared an equitable mortgage is 15 years from the date of execution of the conveyance—a date which has long since passed and which bars Peterson's claim for relief.

Minn. Stat. § 559.18 provides:

No conveyance absolute in form between parties sustaining the relation of mortgagor and mortgagee, whereby the mortgagor or the mortgagor's successor in interest conveys any right, title or interest in real property theretofore mortgaged, shall be presumed to have been given as further security, or as a new form of security,

or that payment of any existing mortgage indebtedness, or any other indebtedness, or as security for any purpose.

Admittedly, Minn. Stat. § 559.18 does not unambiguously apply to the declaration of an equitable mortgage under the facts presented here. The language of the statute, which was drafted in 1913 and has been only minimally modified since that time, is not a model of clarity. Therefore, review of the legislative history is necessary to determine whether the legislature intended equitable mortgage claims to be encompassed by this section.

The interpretation of a statute is a question of law, which this court reviews de novo. *Nash v. Wollen*, 656 N.W.2d 585, 589 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). In interpreting a statute, if the language is ambiguous, this court considers the legislature's intent. Minn. Stat. § 645.16 (2004). Examination of the legislative history of Minn. Stat. § 559.18, makes apparent that the statute—and its accompanying 15-year limitation period found in Minn. Stat. § 559.19—apply directly to the transaction at issue. First, the General Laws for the State of Minnesota for 1913 (the year of enactment of the precursor statutes to Minn. Stat. §§ 559.18, .19, and .20) provide in Chapter 209—H.F. No. 175 that the act relates “to certain conveyances between parties sustaining the relation of mortgagor and mortgagee, prescribing the effect thereof and limiting the time within which such conveyances may be adjudged a mortgage.” A.A. 15. Additionally, commentary related to General Statutes of Minnesota 1923, § 9575 (the precursor statute to Minn. Stat. § 559.20) states that,

. . . [the section] legalizes as a mortgage or security for debt any instrument relating to real estate made prior to January 1, 1916, which is absolute in form but given and intended as security for a debt and in which the fact that it is so intended and the amount of such debt are not expressed.

A.A. 21.

Finally, the commentary to Mason's Minnesota Statutes 1927, § 9573 (the precursor statute to Minn. Stat. § 559.18) further discusses the relationship of the section to equitable mortgages, evincing the intent of the legislature that Minn. Stat. §§ 559.18, .19, and .20 apply to equitable mortgages.³

Because Minn. Stat. § 559.18 would have applied squarely to the action Peterson sought to bring at the district court (that is, if the Johnsons had not already recorded the warranty deed conveying the Property and a determination of whether the transaction constituted an equitable mortgage was appropriate) the limitation on actions found in Minn. Stat. § 559.19 applies.

Under this statute of limitations, Peterson was required to bring a claim for the declaration of an equitable mortgage within 15 years from the execution of the conveyance documents. *See* Minn.

³ The annotations to Section 9573 state:

The evidence sustains the finding of the trial court that a deed given by the defendant Albert Woolery to his brother, the defendant Roy Woolery, was intended as a mortgage. This holding is made having in view the rule, announced in *Young v. Baker*, 128 Minn. 398, 151 N.W. 132, that evidence to prove a deed a mortgage must be clear, strong, and convincing. 156-193, 194 + 753.

In an action at law, a deed absolute on its face may be shown to be in fact a mortgage, without bringing a bill in equity to have it declared. 161-157, 201+299.

If a deed was given as security, the fact that it contains no statement of the amount of the debt will not defeat an action brought to have the deed declared to be a mortgage registry tax imposed by section 2302, G. S. 1913, defeat the action. 161-391, 201+623.

The finding that the deed in controversy was given as security and is in fact a mortgage is sustained by the evidence. 163-242, 203+961.

Stat. § 559.19. Because both the warranty deed and the Agreement were executed in 1986, Peterson was required to bring his action to have the transaction declared an equitable mortgage before December 2001, at the latest. Peterson failed to do so; his claim to have the transaction between the Petersons and the Johnsons declared an equitable mortgage is therefore barred. Because this is the case, the district court erred in denying the Johnsons' motion for summary judgment that Peterson's claim was untimely. This court should reverse that determination and grant summary judgment in the Johnsons' favor that the Minn. Stat. § 519.19 limitation on actions bars Peterson's request for relief.

C. Even if the Limitation Period for Peterson's Action Had Not Expired, the District Court Erred in Granting Summary Judgment in Favor of Peterson Because Peterson Failed to Prove that the Conveyance of the Property Constituted an Equitable Mortgage.

1. The district court erred by relying on an ambiguous agreement executed several months after a conveyance absolute on its face, in concluding that the conveyance was an equitable mortgage.

The district court concluded that, despite the execution and outright conveyance of a warranty deed by the Petersons to the Johnsons, the transaction was an equitable mortgage. Because the district court erred in relying on an ambiguous agreement in reaching this determination, this court should reverse the district court's grant of summary judgment that the conveyance was nothing more than an equitable mortgage.

Generally, "a deed absolute in form is presumed to be, and will be treated as a conveyance unless *both parties* in fact intended a loan transaction with the deed as security only." *Ministers Life*, 307 Minn. at 138, 239 N.W.2d at 210 (emphasis added). A court must not hold a deed which is absolute on its face to be an equitable mortgage unless "both parties so intended . . . even if one party actually intended to enter into a mortgage agreement, unless the other party had the same intention, the transaction should not be construed to be an equitable

mortgage.” *Id.* at 140, 239 N.W.2d at 211. The rule in Minnesota is that the “relevant intention is that of the parties *at the time of the conveyance.*” *Id.*, 307 Minn. at 137-138, 239 N.W.2d at 210 (emphasis added); *St. Paul Mercury Indem. Co. v. Lyell*, 216 Minn. 7, 11, 11 N.W.2d 491, 494 (1943). Intention must be ascertained by the written memorials of the transaction and the attendant facts and circumstances. *Westburg v. Wilson*, 185 Minn. 307, 309, 241 N.W. 315, 316 (1932).

Additionally, “A contract is ambiguous if it is susceptible to more than one interpretation based on its language alone.” *Lamb Plumbing & Heating Co. v. Kraus-Anderson of Minneapolis, Inc.*, 296 N.W.2d 859, 862 (Minn. 1980). The determination of whether a contract is ambiguous is a question of law which this court reviews de novo. *Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004). In contrast, the construction of an ambiguous contract term is a question of fact unless the evidence is conclusive. *Empire State Bank v. Devereaux*, 402 N.W.2d 584, 587 (Minn. App. 1987).

As stated *supra*, summary judgment determinations are not appropriate for claims in which issues of intent must be examined. *Pfizer, Inc.*, 538 F.2d at 185; *White Motor Co.*, 372 U.S. at 259, 83 S. Ct. at 700. Minnesota case law evaluating equitable mortgage claims clearly holds that the intention of the parties at the time of the conveyance is paramount to the determination of whether an equitable mortgage was created by the transaction. *See, e.g., Ministers Life*, 307 Minn. 138, 239 N.W.2d at 210; *St. Paul Mercury*, 216 Minn. At 11, 11 N.W.2d at 494. Here, despite the evidence presented by the Johnsons that they never intended for the conveyance from the Petersons to constitute an equitable mortgage, but rather a contract with an option for the Petersons to repurchase the Property at a later date, the district court made a unilateral decision on summary judgment about the intent of the Johnsons. In so doing, the

district court ignored the facts that (a) the conveyance of the warranty deed to the Johnsons preceded the Agreement; (b) the Agreement (which terms are ambiguous, at best) evinces the Johnsons's intent that the transaction constitute a conveyance and not an equitable mortgage; (c) the Johnsons recorded the warranty deed and paid taxes on the Property believing that the Property was theirs; and (d) Peterson waited over 17 years—and failed to make any payments on the alleged mortgage since 1991—before asserting his adverse claim to ownership of the Property. *See* A.A. 1-8

With respect to item (c), above, the district court relied heavily on the ambiguous terms of the Agreement in concluding that an equitable mortgage existed. The district court determined that certain terms of the Agreement indicated that the parties intended the conveyance to constitute an equitable mortgage. But the district court failed to acknowledge terms in the Agreement that conflicted with this interpretation, including that the Johnsons would “reconvey”⁴ the property to the Petersons upon completion of the Petersons' obligations under the Agreement. A.A. 3.

Absent outright reversal of the decision below based on the district court's misapplication of the statute of limitations, this court should reverse and remand this case on the alternative basis that genuine issues of material fact remain regarding the intention of the parties at the time of execution of the warranty deed. Determination on summary judgment is notoriously inappropriate for divining the intention of parties to an ambiguous agreement. Accordingly, this court should in the alternative reverse the determination of the district court that the conveyance

⁴ Reconveyance, and its verb form reconvey, are defined in Black's Law Dictionary as “The restoration or return of something (esp. an estate or title) to a former owner or holder.” Black's Law Dictionary (7th ed.) at 1279.

of the Property was an equitable mortgage and remand the case for further fact-finding in the district court.

2. The district court erred by failing to apply the proper burden of proof in concluding that the conveyance absolute on its face was an equitable mortgage.

In granting Peterson's motion for summary judgment that the transaction between the parties amounted to an equitable mortgage, the district court reasoned: (a) "The terms of the written agreement . . . *indicate* a loan with the conveyance as security" (emphasis added); and (b) the Johnsons failed to offer an explanation of why they would have agreed to encumber the Property that the Petersons had by warranty deed conveyed to them. This reasoning of the district court demonstrates that it did not view the evidence in the summary judgment record under the appropriate evidentiary standard to determine whether the transaction created an equitable mortgage. Accordingly, this court should reverse and remand this case with direction to the district court to apply the proper evidentiary burden, which requires a showing of the existence of an equitable mortgage by clear, strong and convincing evidence.

In order for the moving party to prove that a conveyance absolute on its face is an equitable mortgage, a mere preponderance of evidence is not sufficient; the proof must be clear, strong, and convincing. *Nitkey v. Ward*, 199 Minn. 334, 271 N.W. 873 (1937), *cert. denied* 302 U.S. 706 (1938); *Durgin v. Stevenson*, 192 Minn. 526, 257 N.W. 338 (1934). Here, not only did the district court err by failing to apply the proper statute of limitations, it also erred by failing to measure the evidence in the summary judgment record against the heightened burden that Peterson bore to show *clearly, strongly and convincingly* that an equitable mortgage was intended by both the parties. The only observation by the district court that provides a clue to the burden it assigned to Peterson to show the existence of an equitable mortgage is its conclusory statement that, "The terms of the written agreement . . . *indicate* a loan with the conveyance as

security” was apparently intended (emphasis added). The Agreement, the terms of which are ambiguous, at best, also indicates in contrary fashion that the Johnsons intended to give the Petersons a conditional option to repurchase the Property. A.A. 3. There is no indication that the district court applied the correct and heightened burden of proof to the evidence on the critical issue of whether an equitable mortgage was intended. Moreover, there is no evidence which clearly and convincingly supports the district court’s conclusion that an equitable mortgage existed. Accordingly, this court should reverse the district court’s grant of summary judgment and remand for further proceedings.

CONCLUSION

The district court erroneously applied the limitation on actions of Minn. Stat. § 541.03 to conclude that Peterson’s claim to the Property was not time-barred. Because, under the applicable statute of limitations Peterson’s action was untimely, the district court erred in granting summary judgment in favor of Peterson; that determination should be reversed and this court should grant summary judgment in favor of the Johnsons on Peterson’s claim to the Property.

Alternatively, the district court erred in granting summary judgment to Peterson on the issue of whether an equitable mortgage was intended because the Agreement was ambiguous and because it failed to apply the heightened and more demanding burden of proof that applies to the question of the existence of an equitable mortgage. Under this alternative error, this court must reverse and remand this case to the district court for further proceedings consistent with its opinion.

Dated:

9/6/05

Gary A. Van Cleve

Gary A. Van Cleve (156310)

Molly McKee (341885)

Larkin Hoffman Daly & Lindgren Ltd.

1500 Wells Fargo Plaza

7900 Xerxes Avenue South

Minneapolis, Minnesota 55431-1194

(952) 835-3800

Attorneys for Appellants

1026000.2

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).