

NO. A10-1672

State of Minnesota  
 In Court of Appeals

NC Properties, LLC,

*Appellant,*

vs.

Eric Lind and April Lind; Trend Title, LLC;  
 Community Bank of Plymouth; ING Bank, F.S.B.,

*Respondents,*

and

Eric Lind and April Lind,

*Third Party Plaintiffs,*

v.

Thomas Buslee and Tradition Capital Bank,

*Third Party Defendants.*

**APPELLANT'S REPLY BRIEF**

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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).

**TABLE OF AUTHORITIES**

Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986).....1, 2, 3

## ISSUES PRESENTED

1. Respondents misstate that NCP did not raise “ambiguity” as an argument before the district court.

NCP raised ambiguity as argument in district court. Authority: Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986). (Appellant’s App. P. 17-18, 178)

### I. LEGAL ANALYSIS

Respondents Linds and ING misstate the record by contending NCP raised the argument that the parties’ documents were “ambiguous” for the first time on appeal. Contrary to respondents’ contentions, NCP argued to the district court that the contractual language raised factual issues that cannot be determined on summary judgment. (Appellant’s App. p. 17-18) NCP cited Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426 (Minn. 1986), whereby NCP argued in accordance with Novus, genuine issues of material fact remained as to whether the mortgage was intended to survive cancellation or was a down payment made to induce Plaintiffs to enter into the contract. (Appellant’s App. P. 17-18) NCP argued numerous fact issues and ambiguities with the documents as set forth in selected portions of the summary judgment transcript. (App. P. 159-171):

Moreover, NCP specifically argued at the summary judgment hearing as follows:

We have an issue of fact here that is clearly established. Counsel tries to gloss over the statement of the down payment and it is clear that he can’t refute that....And then the intent of the – so the down payment is a – clearly a fact issue as laid out in Mr. Buslee’s affidavit. And then the intent of the parties is whether these – all the other loan documents survive cancellation, and we’ve got express statements that they do. (App. P. 166) All right. Fact issues. As to the down payment. (App. P. 167) Wherein a detailed discussion of the fact issues applying the Novus case was discussed at App. P: 167-171. For example, NCP argued below:

Notwithstanding, the Novus Court goes on, because they didn't have, similar to us, the survival. "While 'expressly designating a note as a down payment that survives cancellation would be ideal, we're not prepared to say that such designation is the only way the party's intent may be adequately expressed – expressed as a down payment. We conclude: The question of whether the Novus note was a down payment or simply additional evidence of a contract is a question of fact. In construing contract language where there is ambiguity, resort to extrinsic evidence may be had." It goes on to state that in that case, the parties had conflicting affidavits, they have to take the affidavit as true, it creates a fact issue. The – the documents – again, we have a fact issue, it's – it's a clear fact issue of whether this was a down payment.

(Appellant's Supplement to App. P. 170)

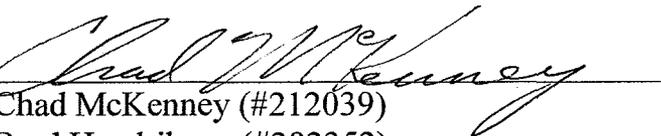
The responses submitted by the Linds and ING highlight that genuine issues of material fact remain as to whether the mortgage was given to induce the sale and whether it was intended to survive summary judgment. The Novus court explained that a "down payment" consists of the amounts paid by the buyer "initially to induce the seller to enter into the contract, thereby conveying equitable title and surrendering possession of the land." Novus at 429. NCP intended that the cash and mortgage securing the initial payment upon signing of the purchase agreement was the required down payment, and that the cash and initial payment upon signing was made to induce the sale of the property. Respondents acknowledge ambiguity over the "cash" contribution. Because the parties differed as to the meanings of the contractual language, the contract language is ambiguous and extrinsic evidence should be allowed to determine the parties' intentions of their agreement and summary judgment was not appropriate.

Moreover, respondents cannot credibly contend that they were surprised or that it is unfair for the mortgage to survive the cancellation of the purchase agreement. The

Linds were aware and expressly agreed that their obligation survived cancellation of the purchase agreement. Moreover, as shown in Novus, it is not “unfair” or a “mockery” for agreed obligations to survive cancellation of a contract. Consequently, at a minimum, material issues of genuine fact remain and summary judgment was not appropriate.

Dated this 12<sup>th</sup> day of January, 2011.

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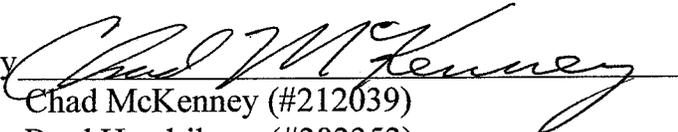
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**CERTIFICATE OF COMPLIANCE**

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subdiv. 3(a). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. font, which reports that the brief contains 1,001 words.

Dated this 12<sup>th</sup> of January, 2011.

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