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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-438**

First Minnesota Bank,  
Respondent,

vs.

C & M Real Estate Services, Inc., et al.,  
Appellants.

**Filed December 14, 2010  
Affirmed in part, reversed in part, and remanded  
Shumaker, Judge**

Crow Wing County District Court  
File No. 18-CV-08-6177

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Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and  
Collins, Judge.\*

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**SHUMAKER**, Judge

Contending that a guaranty is not a debt that can be secured by a mortgage, appellants challenge the district court's determination that respondent bank is entitled to foreclose a mortgage that secures only a guaranty of a principal debt. We affirm in part, reverse in part, and remand.

### FACTS

Appellant C & M Real Estate Services, Inc. (C & M) is a Minnesota limited liability corporation formed by appellants Michael Wayman and Cori Wayman—respectively C & M's president and vice-president—to purchase real estate in Minnesota. Respondent First Minnesota Bank (FMB) is a Minnesota banking corporation. FMB lent various sums of money to C & M to fund C & M's real-estate purchases.

At issue in this appeal is FMB's \$270,000 revolving loan to C & M in October 2004. C & M executed a promissory note, promising to repay the loan, with interest, by a particular date. The Waymans executed personal guaranties of the note, and to secure the loan they gave to FMB a mortgage on their lake home in Crow Wing County. The loan was modified in 2005, 2006, and 2007, each time to extend its maturity date, but the principal debt remained the same. The Waymans' guaranties were also modified accordingly.

C & M's promissory note contained what FMB characterized as a "cross-default provision," under which a default on any other loan would constitute a default on the revolving loan. The note further provided that, in the event of a default, FMB would

have the right to foreclose the mortgage on the Waymans' lake home. The Waymans' guaranties contained "cross-liability" provisions extending the guaranties to any and all indebtedness of C & M to FMB.

In addition to the revolving-credit loan, FMB made eight other loans to C & M, each secured by mortgages of real estate in various counties.

C & M defaulted on the revolving loan, and on other loans as well. As of June 12, 2009, the outstanding balance on the aggregate of the eight additional loans was \$1,288,353.92. The outstanding balance on the revolving loan was \$2,533.82. FMB sought to collect under the Waymans' guaranties but the Waymans failed and refused to pay.

FMB sued appellants in Crow Wing County on breach-of-contract and other theories and, among other relief, sought the court's judgment of foreclosure on the Waymans' lake-home real estate. FMB moved for summary judgment. The district court granted the motion in part, determining that C & M breached its promissory note and that the Waymans breached their guaranties. The court awarded judgments of \$2,533.92 on the promissory note at issue and \$362,683.76 on indebtedness secured by mortgages in other counties. The court also ordered judgment of foreclosure on the Waymans' Crow Wing County lake home.

FMB was the sole bidder at the sheriff's sale, with a credit bid of \$320,000, and FMB moved to confirm the sale. The appellants' motion to stay further proceedings pending an appeal was granted.

In addition to the Crow Wing County action, FMB sued appellants in the various other counties in which mortgaged real estate was located and obtained judgments of foreclosure as to six mortgages. The outstanding principal indebtedness on the debts secured by such other mortgages at the time of this action was \$1,288,353.92.

On appeal, appellants contend that the district court erred in permitting foreclosure of their Crow Wing property because the underlying mortgage was invalid. Alternatively, they argue that, even if the mortgage is valid, it had been satisfied as of the time of this action. Appellants also urge that the district court's rulings in effect will permit FMB to collect the debt twice.

## D E C I S I O N

“On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citations omitted). “On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Id.* If there are genuine issues of material fact, a reviewing court will reverse the grant of summary judgment and remand for trial. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 330 (Minn. 2004). Although the appellants have suggested that the record below is insufficient to

support the district court's rulings, they have not identified disputed material facts—with one exception, discussed below—that would preclude summary judgment. Rather, they have raised issues of law.

Appellants argue that the mortgage is invalid because it did not secure a debt. In the alternative, they claim that an amendment to the mortgage secured a new debt or increased the existing amount of debt and therefore invalidated the mortgage.

### *Guaranty*

Appellants contend a guaranty is not a debt under Minn. Stat. § 287.01, subd. 3 (2008) (the Mortgage Registry Tax statute), which defines “debt” as “the principal amount of an obligation to pay money that is secured in whole or in part by a mortgage of an interest in real property.” Minn. Stat. § 287.01, subd. 3 (2008). The statute requires a mortgage to list the indebtedness it secures. Minn. Stat. § 287.03. Here, the mortgage and its subsequent amendments list the Waymans’ personal guaranties for \$270,000 as the debt it secures.

Section 287.01, subdivision 3, defines “debt” in terms of money which the debtor is obligated to pay, namely, the “principal amount.” This, of course, is likely to be the only amount known at the inception of the debt. Appellants appear to construe the statutory definition to mean the “principal indebtedness.” This would be the primary debt of C & M as evidenced by its promissory note. A guaranty is a “collateral engagement for the performance of an undertaking of another, [which] imports the existence of two different obligations, one being that of the principal debtor and the other that of the

guarantor.” *Schmidt v. McKenzie*, 215 Minn. 1, 7, 9 N.W.2d 1, 4 (1943) (citing 24 Am. Jur., *Guaranty* § 4 (1943)). The Waymans’ obligation is only as to their guaranties.

To address the appellants’ contention that a guaranty cannot be a debt that can be secured by a mortgage, we need a broader definition of “debt” than the limited definition in section 287.01. A common dictionary definition of “debt” is “[a]n obligation or liability to pay or render something to someone else.” *The American Heritage Dictionary of the English Language* 481 (3d ed. 1992). The definition is not limited to a principal indebtedness, nor does it exclude a conditional or unmatured indebtedness. It could not reasonably be argued that a promissory note to repay a loan at a particular date ten years from its making is not a debt, even though there is no immediate obligation to pay. In a sense, the note is a “conditional” obligation which does not ripen into an absolute obligation until the condition of the maturity date occurs. Analogously, a guaranty is a conditional obligation that does not become absolute until a default on the underlying obligation. *See Schmidt*, 215 Minn. at 7, 9 N.W.2d at 4. Although the principal obligation is certain to become absolute and the guaranty obligation might never become absolute, both are obligations or liabilities and both satisfy the concept of “debt.”

The appellants rely on *The Business Bank v. Hanson*, 769 N.W.2d 285 (Minn. 2009), for their assertion that a guaranty is not a debt and, therefore, cannot be secured by a mortgage. The case neither holds that nor specifically addresses the issue. Rather, *The Business Bank* involved a lien priority dispute in which one of the lien claimants contended that an ostensibly prior mortgage was invalid because it did not state the amount of the debt it secured as required by Minn. Stat. § 287.03. *Id.* at 287. The

dispositive issue was whether a debtor's entire indebtedness, a portion of which was unsecured, had to be listed in the mortgage to comply with the statute. *Id.* at 288-89. The supreme court held that a mortgage could comply with the statute by stating the amount of the debt to which enforcement of the mortgage is limited. *Id.* at 289. Although there were guarantees apparently secured by mortgages in the case, the supreme court neither addressed the breadth of the definition of "debt" in Minn. Stat. § 287.01 nor was it presented with the argument that a guaranty is not a debt for purposes of the statute. *Id.* Therefore, *The Business Bank* is not dispositive here. See *Skelly Oil Co. v. Comm'r of Taxation*, 269 Minn. 351, 131 N.W.2d 632 645 (1964) (requiring that opinions be read in light of the issue presented for decision).

#### *Amendment*

Alternatively, appellants allege that the May 30, 2007 amendment invalidated the mortgage because it "secure[d] a new debt or an increased amount of debt" in violation of Minn. Stat. § 287.01, subd. 2. They state that the May 30, 2007 promissory note evidenced a new loan because the previous promissory note had been satisfied, thus requiring FMB to execute a new mortgage to secure the May 30, 2007 promissory note. However, the promissory notes were a result of FMB's revolving loan to appellants. The May 30, 2007 promissory note even states that it is a renewal of a previous loan, which is specifically referenced at the top of the document. The promissory note also states that its purpose is to "renew working capital line" and that the parties agreed C & M may "borrow up to the maximum amount [\$270,000] more than one time." Furthermore, all of the promissory notes contained explicit language establishing that "renewal of this

note . . . will not release [appellants] from [appellants'] duty to pay it.” Those documents show that there was neither a new debt nor an increase in the amount of the secured debt.

*Farmers Union Oil Co. v. Fladeland* supports FMB’s contention that “execution of a renewal note evidences the same debt by a new promise and does not constitute a payment or discharge of the original note but operates only as an extension of time for payment.” 287 Minn. 315, 319, 178 N.W.2d 254, 257 (1970). The May 30, 2007 promissory note was a renewal note and the document, signed by appellants, clearly stated as much. The only change in the renewal note was the maturity date, which extended the time for appellants to repay their debt. Therefore, the May 30, 2007 promissory note was not a new debt, as appellants argue. Appellants’ argument that the mortgage is invalid because it secures a new debt is unpersuasive.

A mortgage amendment does not require the parties to execute a new mortgage if, without securing new or increased debt, it merely “extends the time for payment of the unpaid portion of the original debt.” *See* Minn. Stat. § 287.01, subd. 2(i) (2008). Here, the mortgage did not secure a new or increased debt. The only change on the May 30, 2007 mortgage amendment was the maturity date and its reference to an updated guaranty agreement. The guaranty agreement did not secure a new loan, as appellants contend, but merely evidenced renewal of a previous loan. Furthermore, the parties expressly agreed that the mortgage “does not secure a new or an increased amount of debt,” and that “[appellants] agree that this modification continues the effectiveness of the original Security Instrument.”

### *Satisfaction of Mortgage*

Appellants claim that if the mortgage is valid, the obligation it secured was satisfied, extinguishing the second debt. *See Hendricks v. Hess*, 112 Minn. 252, 256, 127 N.W. 995, 997 (1910). They argue that upon satisfaction of the mortgage debt the guaranty ceased to exist. *See The State Bank of Young America v. Fabel*, 530 N.W.2d 858, 862 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). Therefore, appellants argue the district court erred when it granted summary judgment on FMB's breach-of-contract claims.

The guaranty agreements signed by the Waymans established that default occurs upon: (1) failure to make payment on the promissory note; or (2) failure to make payment on any other indebtedness owed by C & M to FMB. C & M had eight other outstanding loans with FMB at the time of this case. By the time C & M defaulted on its promissory note in this case, it had already independently defaulted on most of its other obligations to FMB.

FMB claims appellants defaulted both by failing to pay on the note and failing to pay other indebtedness. Appellants concede they failed to timely furnish payment due on the promissory note by the June 1, 2008 deadline, but argue they satisfied their obligation on September 27, 2008, when they paid FMB \$79,528.72, what they believed was the remaining balance on the note. FMB claims an additional \$2,533.82 remained unsatisfied on the note as of July 13, 2009. Appellants contend they satisfied the obligations from the May 30, 2007 note and therefore the mortgage is extinguished.

Appellants overlook the fact that their guaranties extend to the performance of all C & M's obligations to FMB. Thus, in order to satisfy the debt secured by the mortgage, all debts to FMB must be satisfied, not just obligations arising from the May 30, 2007 note. The mortgage is extinguished only upon full payment of all debts appellants owe FMB, which FMB alleged is in excess of \$1,288,000, as of June 12, 2009.

The Waymans' guaranties stated that they guaranteed the

payment and performance of each and every debt, liability, and obligation of every type and description which [appellants] may now or at any time hereafter owe to [FMB] [whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect.

The guaranties, signed by the Waymans, clearly indicated that nothing except full payment of *all* indebtedness to FMB would satisfy the guaranties and extinguish the mortgage.

FMB presented admissible evidence to the district court, in the form of an affidavit from FMB's president, stating appellants owed in excess of \$1,288,000 as of June 12, 2009. Appellants did not dispute that they owed FMB this money. Viewing this evidence in the light most favorable to appellants, the district court could not reach any conclusion other than that appellants owed FMB a significant amount of money; this debt was not yet satisfied; and under the guaranty agreements, the mortgage on the Waymans' lake home was not extinguished. Thus, the district court properly granted summary judgment on FMB's breach-of-contract claims, and we affirm.

### *Amount of Indebtedness*

Appellants allege a fact dispute regarding the amount of unsatisfied guaranty obligations. In its amended order, the district court granted FMB a judgment against appellants of \$373,629.90 on C & M's breach of the promissory note and on the Waymans' breaches of their respective guaranties. In addition to \$2,533.92 for C & M's breach of the note at issue, the district court's judgment includes \$362,683.76 for outstanding indebtedness from FMB's eight other loans to appellants. This amount consists of \$270,000 principal, accrued interest, and late fees.

In response to FMB's summary-judgment motion, appellants submitted evidence of judgments entered in FMB's favor from Anoka, Hennepin, and Ramsey counties that allowed FMB to foreclose six mortgages to recover appellants' indebtedness. The Anoka County judgment awarded FMB the outstanding balance on the two loans secured by property in Anoka County, and accrued interest and late fees. The Hennepin County judgment awarded FMB the outstanding balance on the two loans secured by property there, in addition to accrued interest and late fees. Ramsey County's judgment awarded FMB the same with respect to two loans secured by properties in Ramsey County. The third loan secured by a mortgage on property in Ramsey County is the subject of ongoing litigation in federal court. At the time this matter was before the Crow Wing County district court, the parties were awaiting an order to be issued on FMB's summary-judgment motion regarding the loan secured by property in Sherburne County.

FMB's memorandum to the district court in support of its summary-judgment motion stated that it had not held foreclosure sales on any of the properties. At the

motion hearing, FMB's counsel also said FMB had not yet held any foreclosure sales. The district court, nevertheless, granted FMB summary judgment.

Implicit in the court's decision is that there is no genuine issue of material fact that appellants' outstanding debt after the foreclosure sales will be more than \$270,000, and that foreclosure sales will not cover any of the accrued interest or late fees appellants owe FMB. We disagree.

Because no foreclosure sales had taken place when this case was before the district court, it was impossible to definitively conclude that deficiency judgments would total more than \$270,000 or that foreclosure sales would not satisfy the additional costs of accrued interest and late fees. Each judgment allowed FMB to collect the entire outstanding balance of loans secured by real estate in the county and the accrued interest and late fees associated with those loans. It is possible that the foreclosure sales would satisfy the amount appellants owe FMB. But even if the foreclosure sales fail to satisfy appellants' debt to FMB, the amount appellants will be obligated to pay is unknown. With judgments entered in FMB's favor and without any foreclosure sales having been held, there is a genuine issue of material fact as to the amount of appellants' indebtedness or that foreclosure sales would result in deficiency judgments totaling more than \$270,000 .

FMB argues appellants will still owe FMB more than the \$362,683.76 judgment awarded in this case even after collecting on the judgments in other counties. Appellants presented evidence to the district court that rebutted this assertion. The amounts appellants owe on two of the eight loans that were unaccounted for in the judgments from

Anoka, Hennepin, and Ramsey counties, and were similarly indeterminable at the time this case was before the district court. Property in Ramsey County that secures one of the loans is still the subject of ongoing litigation in federal court, as it was at the time of FMB's motion for summary judgment. Moreover, the Sherburne County district court had not yet issued an order on FMB's summary-judgment motion regarding the other loan when FMB's motion was before the Crow Wing County district court. FMB states Sherburne County has since entered a judgment in its favor. Yet this is of little help, as it now presents the same issues that arise in the judgments from Anoka, Hennepin, and Ramsey counties.

There are genuine issues of material fact regarding the amount of indebtedness appellants owe to FMB. There is insufficient information to determine adjustments to the amount appellants will owe after foreclosure sales have been held. Accordingly, the district court erred in granting summary judgment in favor of FMB on this issue, and it is appropriate that this issue be remanded for further appropriate proceedings and determination.

**Affirmed in part, reversed in part, and remanded.**