STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1472

U. S. Bancorp,
Appellant,

vs.

Michael A. Mitgang, et al.,
Respondents.

Filed June 1, 2010
Reversed and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-08-19039

David F. Herr, Keiko L. Sugisaka, Maslon Edelman Borman & Brand LLP, Minneapolis, Minnesota (for appellant)

R. Travis Snider, Snider Law Firm Ltd, Minneapolis, Minnesota; and

David L. Shulman, Law Office of David Shulman, Minneapolis, Minnesota (for respondents)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the grant of summary judgment to respondent-borrowers, arguing that the district court erred in its interpretation of a loan agreement and its grant

of summary judgment sua sponte. Because we conclude that the district court erred in its interpretation of the loan agreement, we reverse and remand.

FACTS

By letter of February 7, 2000, U.S. Bancorp Piper Jaffray Inc. (U.S. Bancorp Piper) offered certain key employees, including respondents Michael A. Mitgang, Chung H. Lim, Allan F. Hickok, and Leslie E. Danford, an opportunity to participate in the U.S. Bancorp Piper Jaffray ECM Fund I LLC (Fund), a new investment fund managed by U.S. Bancorp Piper. At the time, U.S. Bancorp Piper was a wholly owned subsidiary of appellant U.S. Bancorp. U.S. Bancorp Piper's investment opportunity provided that respondents' capital commitments to the Fund "could be leveraged at the option of [respondents] through a program which ha[d] been established with U.S. Bancorp." To participate in the Fund, each respondent had to be "an accredited investor," which meant meeting one of the following definitions:

- A natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his or her purchase exceeds $1,000,000.

- A natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year.

To invest in the Fund, appellant made leverage capital loans available to respondents. The leverage capital loans bore interest at 7% per annum and were "50% recourse and 50% non-recourse." In the letter offer, U.S. Bancorp Piper explained that "[r]ecourse debt is the obligation of [respondent] to repay under any circumstance," and

"[n]on-recourse debt is the obligation of [respondent], but is only repayable from the proceeds generated by [respondent's] interest in the Fund. Interest due on all leverage capital loans i[s] recourse to [respondent]."

Respondents invested in the Fund with leverage capital supplied by appellant. Respondents executed promissory notes (Notes) and Loan and Security Agreements (Agreements) with appellant. Mitgang borrowed $140,000 from appellant, Lim and Hickok each borrowed $280,000, and Danford borrowed $560,000. The maturity date of the Notes was December 31, 2007. To secure their obligations under the Notes, respondents granted appellant a security interest in their rights under the Agreements, which also provided for mandatory prepayments and distribution payments:

> **5. Mandatory Prepayments**
>
> Immediately upon the making of any Distribution, other than a Tax Distribution, the Borrower will prepay this Note in the amount of such Distribution.
>
> . . . .
>
> **7. Distribution; Further Directions to Fund**
>
> (a) The Borrower hereby irrevocably authorizes and directs the Fund and the Managing Member [U.S. Bancorp Piper] to remit any and all Distributions, other than Tax Distributions, directly to the Lender [U.S. Bancorp] in the Lender's name alone. The Lender shall promptly apply each such Distribution as a prepayment of the Obligations. The Fund shall continue to remit all such Distributions to the lender until the Lender otherwise notifies the Fund or the Managing Member in writing. To the extent that such remittances are made directly to the Lender, the Fund shall have no further liability to the Borrower for the same.

Consistent with U.S. Bancorp Piper's letter offer, the Agreements limited respondents' personal liability to repay the Notes:

> **11. Limited Recourse**
>
> (a) Notwithstanding any other provision of this Agreement or the Note, the personal liability of the Borrower under the Note shall be limited to the sum of (i) 50% of the aggregate principal amount of the advances under this Agreement, and (ii) the aggregate interest outstanding as of the date of determination. The personal liability of the Borrower with respect to the principal balance of the Note shall not be reduced by any payment, except to the extent that, following such reduction, the principal balance of the Note is less than 50% of the aggregate principal amount of the advances under this Agreement.
>
> (b) The limitation set forth in paragraph (a) shall be void and of no effect if any event described in paragraph 9(a) shall occur.[1]
>
> (c) Nothing herein shall limit the Lender's recourse against the Collateral for the full amount of the Borrower's Obligations.

[1] Paragraph 9(a) of the Agreements provided:

> **Termination of Lender's Obligation.** The Lender's obligation to make advances hereunder will terminate upon the occurrence of any of the following events (each, a "Termination Event"):
>
> (a) The Borrower's employment with U.S. Bancorp Piper Jaffray Inc. (or any of its Affiliates, as defined in the Member Control Agreement) is terminated for Cause, or the Borrower shall at any time become Involved with a Competitor.

The Fund distributions were insufficient to pay the indebtedness owed by respondents by the maturity date of Notes, and appellant sued respondents to recover the balance of the loans. Appellant claimed that the balances owed by respondents on their Notes were: Mitgang $46,160.19; Lim $82,553.99; Hickok $99,900.13; and Danford $179,717.80. Appellant moved for summary judgment. Respondents opposed summary judgment, arguing that the limited-recourse provision in the Agreements was ambiguous.

Noting that the dispute was "over the interpretation of Clause 11(a) of the [Agreements]," the district court said:

> The interpretation of the clause is a matter of law because it is not ambiguous. The language of Clause 11(a) is clear. Perhaps, to the layperson, language such as that contained in the clause would seem confusing. As business professionals, however, [respondents] and U.S. Bancorp are experienced in such matters and must have read the clause as having its plain meaning.
>
> The clause states that [respondents] would remain personally liable until the payments reduced the principal balance to less than 50%. A plain reading shows the agreement would relieve [respondents] of liability once the 50% mark was reached. Furthermore, the purpose of the investment plan supports this reading. U.S. Bancorp agrees the opportunity offered to [respondents] was part of an effort to retain them as employees. If [respondents] were to risk personal liability until the fund earned enough to repay the entire amount they borrowed to invest in it, there would have been little benefit to their participation.
>
> The language of the clause is plain. No genuine issue of fact exists as to what order of payment was intended by the clause. Because the terms of the contract are clear and [respondents] have met their liability under the contract, they are entitled to judgment in their favor. U.S. Bancorp has had an opportunity to argue its case, so summary judgment for [respondents] will not prejudice it.

This appeal follows.

D E C I S I O N

I

Appellant argues that the district court erred by denying its motion for summary judgment. Summary judgment should 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 as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court asks 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). This court reviews "de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). This court "must review the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A motion for summary judgment is a dispositive motion.

> No [dispositive] motion shall be heard until the moving party . . . serves a copy of the following documents on opposing counsel, and files the original with the court administrator at least 28 days prior to the hearing: (1) Notice of motion and motion; (2) Proposed order; (3) Any affidavits and exhibits to be submitted in conjunction with the motion; and (4) Memorandum of law.

Minn. Gen. R. Prac. 115.03. The Minnesota General Rules of Practice "apply in all trial courts of the state." Minn. Gen. R. Prac. 1.01.

Appellant agrees with the district court's determination that the limited-recourse provision in the parties' Agreements is unambiguous but argues that the district court erred in its interpretation of the contract provision. Appellant argued to the district court that the language of the limited-recourse provision was clear and that, although respondents' personal liability was limited to 50% of the loan amount, any fund distributions would be credited first against the non-recourse 50% portion of respondents' loans and, when the non-recourse portion was paid, any additional distributions would be credited against the recourse portion of the loans. Respondents argued to the district court that the non-recourse provision in the parties' Agreements was ambiguous but also argued that the provision should be construed to mean that any distributions would be credited first to the recourse 50% portion of the loans and, when the recourse portion of the loans was paid, any additional distributions would be credited against the non-recourse portion of the loans. Appellant argues that the district court adopted a third interpretation of the non-recourse provision not argued by appellant or respondent and one which appellant argues is erroneous as a matter of law.

On appeal, appellant reiterates its argument made to the district court. Respondents argue on appeal that the district court's interpretation of the non-recourse provision was correct. Respondents argue on appeal that if this court determines that "the language does not unambiguously require the recourse portion of the loan to be paid first, then this Court is compelled to reach the conclusion that the contract language is

ambiguous" and that "[t]his ambiguity warranted that [appellant]'s motion for summary judgment be denied."

Contract interpretation is a question of law. *Business Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009) (citing *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998)). When reading a contract, all language in the instrument must be given effect. *Id.* (citing *Metro. Airports Comm'n v. Noble*, 763 N.W.2d 639, 645 (Minn. 2009)). The plain and ordinary meaning of the contract controls, unless the language is ambiguous. *Id.* "The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The language of the contract must be read as a whole and in a manner that gives meaning to all of its provisions. *Brookfield*, 584 N.W.2d at 394. The contract terms may not be construed to yield a harsh or absurd result. *Id.*

"The construction and effect of a contract are questions of law for the court, but where there is ambiguity and construction depends upon extrinsic evidence and a writing, there is a question of fact for the jury." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). Language is ambiguous if it is subject to more than one reasonable interpretation. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). If a contract is unambiguous, a party cannot alter its language based on "speculation of an unexpressed intent of the parties." *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991).

As quoted above, the limited-recourse provision contains the statement that:

> The personal liability of the Borrower with respect to the principal balance of the Note *shall not be reduced by any payment, except to the extent that, following such reduction, the principal balance of the Note is less than 50% of the aggregate principal amount* of the advances under this Agreement.

(Emphasis added.) The district court determined that "[respondents] would remain personally liable until the payments reduced the principal balance to less than 50%." We conclude that the district court erred in its interpretation of the limited-recourse provision in the parties' Agreements.

The unambiguous language in the limited-recourse provision provides that distributions would be credited first to the non-recourse 50% portion of respondents' loans and, if and when the non-recourse 50% portion was paid inclusive of interest, the distributions, if any, would be credited against the recourse 50% portion of respondents' loans. We conclude that under the plain language of the limited-recourse provision, respondents were liable for principal until outstanding principal was 50% paid off, after which they were liable for the remaining balance only on a non-recourse basis.

Appellant also argues that the district court ignored respondents' personal liability for interest accrued on respondents' loans. Appellant submitted an affidavit to the district court setting forth the accrued and outstanding interest. While we need not reach this issue, given our conclusion that the district court erred in its interpretation of the limited-recourse provision, we recognize that the Agreements must be construed with the Notes. Contracts in several writings relating to the same transaction are construed with reference to each other. *Anderson v. Kammeier*, 262 N.W.2d 366, 370 n.2 (Minn. 1977). Here, the

Notes and Agreements reference each other and must be construed with reference to each other. The Notes address the application of payments to interest and unambiguously provide that "[a]ll payments hereunder (including any mandatory prepayments) shall be first applied to accrued but unpaid interest on the principal balance of [the] Note[s] and the remainder, if any, shall be applied to the principal balance of [the] Note[s]."

II

Appellant argues that the district court erred by sua sponte granting summary judgment to respondents. "A district court may, sua sponte, grant summary judgment if, under the same circumstances, it would grant summary judgment on motion of a party." *Estate of Riedel v. Life Care Retirement Communities, Inc.*, 505 N.W.2d 78, 81 (Minn. App. 1993) (citing *Del Hayes & Sons v. Mitchell*, 304 Minn. 275, 280, 230 N.W.2d 588, 591-92 (1975)). A reviewing court will not reverse an otherwise appropriate sua sponte grant of summary judgment unless the objecting party can show prejudice from lack of notice, procedural irregularities, or from the lack of a meaningful opportunity to oppose summary judgment. *Id*.

Here, appellant has shown prejudice. Respondents approached the hearing before the district court, arguing that the limited-recourse language was ambiguous and, although they also argued in favor of their own contract interpretation, they did not move the court for summary judgment—they merely opposed appellant's motion. Appellant had no advance notice that the district court might grant summary judgment to respondents. Moreover, although as noted in its memorandum of law in support of summary judgment, appellant did not rely on the application of paragraph 9(a) of the

Agreements, quoted above in footnote 1, as a basis for its summary judgment motion, appellant "reserve[d] the right to assert the applicability of paragraph 9(a) at trial, if necessary." Appellant has demonstrated prejudice by the district court's sua sponte grant of summary judgment to respondents.

We reverse and remand for entry of judgment in favor of appellant and against respondents in the amounts of the unpaid balances due on their Notes plus accrued interest, together with all costs of collection, including reasonable attorney fees and legal expenses, pursuant to the terms of respondents' Notes and the parties' Agreements.

Reversed and remanded.