STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1280

Northern Star Bank,
Appellant,

vs.

American Investors Bank and Mortgage,
Respondent.

Filed February 15, 2011
Affirmed; motion denied
Connolly, Judge

Hennepin County District Court
File No. 27-CV-10-928

Christopher H. Yetka, Daniel J. Schwartz, Lindquist & Vennum, PLLP, Minneapolis, Minnesota (for appellant)

Peter A. Koller, Jeffrey L. Watson, Curtis D. Smith, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent. Because the district court did not err in its application of the law and there are no genuine issues of material fact raised by this unambiguous contract, we affirm.

FACTS

Appellant Northern Star Bank (NSB) is a Minnesota bank located in Mankato, Minnesota. Respondent American Investors Bank and Mortgage (AIBM) is a federally chartered bank located in Eden Prairie, Minnesota. In 2006, NSB purchased a bundle of mortgages from AIBM; after the purchase, AIBM acted as the servicing agent for these mortgages. The controversy here involves the district court's interpretation of a contract clause contained in the Master Loan Purchase Agreement (the purchase agreement).

The purchase agreement sets forth the rights and obligations of the parties as they pertain to the purchase of the mortgages. Under paragraph 4.2(aa) of the purchase agreement, AIBM warranted that all of the mortgages with a loan-to-value ratio of 90% or more had mortgage insurance as of the date of purchase. Specifically, paragraph 4.2(aa) states:

> For each Loan in which the Combined Loan-to-Value Ratio at Origination equaled or exceeded ninety percent (90%), [AIBM] has acquired Mortgage Deed or mortgage insurance in an amount at least as great as the amount available to borrower under the Note. [AIBM] further represents and warrants that said mortgage insurance remains in full force and effect at a monthly cost as disclosed on a loan level multiplier found in Addendum A.

According to the addendum, the total monthly cost of mortgage insurance for these loans was $3,800 at the time of purchase.

After the purchase of the loans, AIBM acted as the servicing agent for the mortgages. The parties entered into a Loan Custody and Servicing Agreement (the servicing agreement) on September 22, 2006; the purchase agreement refers to a

"Servicing Agreement," but without specifically referring to the September 22, 2006 servicing agreement or appending the servicing agreement to the purchase agreement. The purchase agreement defines "Servicing Agreement" to be "[t]he Servicing Agreement relating to a particular sale between the Parties." The purchase agreement also states that the "Entire Agreement" between the parties consists of the purchase agreement, the attached exhibits, and "documents referred to herein." Under the terms of the servicing agreement, NSB is obligated to reimburse AIBM, acting in its role as servicing agent, for the monthly mortgage insurance premiums.

In January 2009, AIBM notified NSB that the mortgage insurance premiums had risen by seven-fold, from about $3,800 per month to $27,000 per month, and suggested that the mortgage insurance be cancelled. NSB refused to agree to cancellation of the mortgage insurance. A June 10, 2009 e-mail from AIBM to NSB indicated that the parties agreed to cancel the mortgage insurance. AIBM filed an affidavit affirming that the parties had agreed to this; NSB filed an affidavit stating that the parties had not agreed and that AIBM acted unilaterally. The e-mails and affidavits are the only written documentation supporting either position. AIBM cancelled the mortgage insurance.

NSB sued AIBM for breach of the purchase agreement for failing to maintain mortgage insurance; NSB did not allege a breach of the servicing agreement or refer to the servicing agreement in its complaint. Both parties brought motions for summary judgment. At issue was construction of paragraph 4.2(aa) of the purchase agreement. NSB argued that this clause meant that AIBM was required to maintain mortgage insurance and to maintain it at the premium listed in Addendum A, or at about $3,800 per

month. AIBM contended that it had fulfilled the requirements of this paragraph because it had acquired mortgage insurance for the loans and the insurance was in force on the purchase date. The district court construed the contract as AIBM did and granted summary judgment in favor of AIBM.

At the summary judgment motion hearing, NSB did not specifically argue that the servicing agreement was a part of the contract and in fact asserted that it was not relying on the servicing agreement. On appeal, NSB argues that the district court should have construed the purchase agreement and the servicing agreement as one contract; NSB also asserts that AIBM breached the entire contract because, under the terms of the servicing agreement, AIBM had to act in NSB's best interests and cancellation of the mortgage insurance was not in NSB's best interests.

D E C I S I O N

We review de novo the district court's grant of summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred as a matter of law. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Evidence is viewed in the light most favorable to the party against whom summary judgment is granted. *Id.*

An unambiguous contract presents a question of law that the appellate court reviews de novo. *City of Va. v. Northland Office Props. Ltd. P'Ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Unless a contract is ambiguous, the plain and ordinary meaning of the contract language is controlling. *Business Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). Contract language is

ambiguous if it can reasonably be interpreted in more than one way. *Id.* The district court found that the language of section 4.2(aa) was unambiguous and that AIBM's interpretation that it was only required to warrant that mortgage insurance was in effect on the purchase date was the only reasonable interpretation. We agree.

By virtue of section 4.2(aa), AIBM warranted that for all loans of a certain value, AIBM "has acquired Mortgage Deed or mortgage insurance in an amount at least as great as the amount available to borrower under the Note. [AIBM] further represents and warrants that said mortgage insurance remains in full force and effect at a monthly cost as disclosed on" Addendum A to the purchase agreement. The district court noted that this language referred to a present obligation ("has acquired" and "remains") rather than to a future obligation. Thus, under the terms of the purchase agreement, AIBM warranted only that mortgage insurance was in effect on the date of purchase.

The district court's interpretation is further supported by other language in the agreement. The various warranties of section 4.2, which includes the disputed clause, are made as of the "Funding Date," which is defined as "the date on which the purchase price for such Loan is paid to [AIBM]." Section 4.2(b) states that AIBM warrants as of the Funding Date that "[AIBM] has transferred to [NSB] all of its right, title and interest in the Note, the related Mortgage Deed and the Loan Documents…." The definition of "Loan Documents" includes "evidence of Mortgage Deed insurance where required." This indicates that AIBM did not maintain any interest in the mortgage insurance after the purchase date, except for its duties as servicing agent under the servicing agreement.

Although AIBM, in its role as servicing agent, may have had some duty to NSB with regard to servicing the mortgage insurance, this was not an element of NSB's complaint.

NSB urges us to consider AIBM's obligations under the servicing agreement, arguing that the purchase agreement, servicing agreement, and related documents are integrated to form one contract. But NSB did not refer to the servicing agreement in the complaint or argue that it formed part of the contract at the summary judgment hearing; in fact, NSB specifically stated at the hearing that it was not alleging breach of the servicing agreement. NSB's failure to assert its reliance on the servicing agreement before the district court operates as a waiver of its right to rely on the servicing agreement on appeal. *See, e.g., In re Welfare of D.D.G.*, 558 N.W.2d 481, 485 (Minn. 1997) (holding that failure to raise issue before district court waives that issue on appeal notwithstanding "gravity of termination proceedings,"); *Graham v. Itasca Cnty. Planning Comm'n*, 601 N.W.2d 461, 468 (Minn. App. 1999) (concluding that appellant "waived the issue by failing to raise it to the board or the district court"); *REM-Canby, Inc. v. Minn. Dept. of Human Servs*., 494 N.W.2d 71, 76 (Minn. App. 1992) (failure to raise issue in administrative proceeding precludes review on appeal), *review denied* (Minn. Feb. 25, 1993)); *Rowell v. Bd. of Adjustment of the City of Moorhead*, 446 N.W.2d 917, 920 (Minn. App. 1989) (concluding that, because party "failed to raise the issue at the public hearings, despite the fact that he had legal representation and an opportunity to speak at the public hearings," party was "estopped from raising these issues in a lawsuit"), *review denied* (Minn. Dec. 15, 1989); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (party may not argue a different theory or change position on

appeal). Nothing prevented NSB from relying on the servicing agreement when it brought and pursued this action, but its decision not to do so then precludes it from doing so now.

Finally, because our decision today makes respondent's motion to strike those portions of appellant's brief dealing with the servicing agreement moot, it is denied.

Affirmed; motion denied.