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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1642**

The Business Bank,  
Respondent,

vs.

Kevin C. Hanson, et al.,  
Defendants,

Option One Mortgage Corporation,  
Appellant.

**Filed April 26, 2011  
Affirmed  
Connolly, Judge**

Hennepin County District Court  
File No. 27-CV-06-14599

Michael A. Rosow, Kristopher D. Lee, Winthrop & Weinstine, P.A., Minneapolis,  
Minnesota; and

Barbara Ross, Best & Flanagan, LLP, Minneapolis, Minnesota (for respondent)

Jonathan M. Bye, Karla M. Vehrs, Lindquist & Vennum P.L.L.P., Minneapolis,  
Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Connolly,  
Judge.

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

The district court included in a judgment granted against a mortgagee in favor of respondent, who was the holder of the primary mortgage, the amount of the mortgage and the costs and fees incurred by respondent's title insurance company. Appellant, the holder of a secondary mortgage, objects to these inclusions in the judgment debt. Because the inclusions are not based on an error of law, we affirm.

### **FACTS**

In August 2004, Kevin Hanson signed a guaranty on his combined obligations of \$511,925.17 to respondent The Business Bank. The guaranty provided that “[a]ny and all payments made by Guarantor [Hanson] or by any other person . . . may be applied by Lender [Business Bank] on such items of the Obligations as Lender may elect.” At the same time, Business Bank obtained and recorded a \$200,000 mortgage on Hanson's home and a \$200,000 mortgage on the home of Hanson's business partner, Travis Carter, who was jointly and severally liable with Hanson for \$400,000 of the debt.

In December 2005, appellant Option One Mortgage Corporation (Option One) recorded a \$1,170,000 mortgage on Hanson's home. Hanson did not disclose Business Bank's mortgage to Option One, and Option One's title search did not reveal it.

In 2006, Hanson and Carter were unable to meet their obligations to Business Bank. Carter paid Business Bank \$219,051.62 (the Carter payment) under a forbearance agreement providing that Business Bank would satisfy Hanson's obligations before further pursuing Carter.

Business Bank then brought a foreclosure action against Hanson and his wife (the Hansons) and joined Option One as a party in order to assert the priority of Business Bank's lien over Option One's lien.<sup>1</sup>

In 2007, the district court granted Business Bank summary judgment in the amount of \$323,623.33 against Option One. Option One appealed, and the matter was ultimately resolved by *Bus. Bank v. Hanson*, 769 N.W.2d 285 (Minn. 2009) (remanding the Hansons' fraudulent inducement claim for trial and concluding that Business Bank's mortgage was valid because it complied with the dispositive statute, Minn. Stat. § 287.05, subd. 1a(a)(2008) (providing that a mortgage "intended to secure only a portion of a debt" may state on its first page that enforcement of the mortgage is limited to the amount secured)). Because Business Bank's mortgage was valid and had been recorded first, it had priority over Option One's mortgage. *Bus. Bank*, 769 N.W.2d at 290.

After obtaining a default judgment against the Hansons, Business Bank requested entry of a judgment that included the amount of the mortgage and subsequently incurred legal fees and costs, some of which were incurred by Business Bank's title insurance company. Following a hearing on Business Bank's request, the district court issued a judgment reinstating the \$323,623.33 judgment for Business Bank and granting an additional \$205,466.51 in litigation costs to the judgment debt.

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<sup>1</sup> Hanson also alleged various claims against Business Bank. Their disposition is not relevant to this appeal.

Option One now challenges the inclusion in the judgment of the mortgage amount and of those fees and costs incurred by the Business Bank's title insurance company rather than by Business Bank.

## DECISION

### 1. Inclusion of the mortgage in the judgment debt

Option One argues that, under Minn. Stat. § 287.05, subd. 1a(a) (2010), the Carter payment satisfied the mortgage. Business Bank argues that the Carter payment did not satisfy the mortgage under the terms of the contracts between the parties. The construction of both statutes and contracts is reviewed de novo. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007) (statutes); *Brookfield Trade Ctr. Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (contracts).

Option One argues that, regardless of the determination that Business Bank's mortgage is valid, *see Bus. Bank*, 769 N.W.2d at 289, the mortgage is no longer in effect because the Carter payment of \$219,051.62 on the debt secured by the mortgage was greater than the \$200,000 amount of the mortgage. But Business Bank was not obliged to apply the Carter payment to that part of the total debt secured by Hanson's mortgage; the guaranty Hanson signed provided that "Any and all payments made by Guarantor [Hanson] or any other person . . . may be applied by Lender [Business Bank] on such items of the Obligations as Lender may elect."

Moreover, the mortgage itself states that it "shall remain in full force and effect and be binding upon the Mortgagor until the Indebtedness Secured Hereby is paid in full," and it defines the "Indebtedness Secured Hereby" to include "the Notes [totaling

\$511,925.17] including any and all renewals, amendments, extensions, and modifications thereof, and all such sums, together with interest thereon”; *see also Bus. Bank*, 769 N.W.2d at 290 (“Hanson owes Business Bank more than \$200,000, and . . . the bank may be able to hold the mortgage until the last dollar of those debts is paid.”)<sup>2</sup>.

The mortgage was not satisfied by the Carter payment and was properly included in the judgment debt.

## **2. Inclusion of title insurance company’s fees and costs in judgment debt**

Option One argues that the addition of fees and costs incurred by any entity other than the mortgagee is forbidden by statute. The construction of statutes is reviewed *de novo*. *Lee*, 741 N.W.2d at 122.

The effect of a mortgage intended, like Business Bank’s mortgage, to secure only part of a debt is limited to the amount stated in the mortgage and “additional amounts for accrued interest and advances not subject to tax under subdivision 4.” Minn. Stat. § 287.05, subd. 1a(a).

No tax under section 287.035 shall be paid on the indeterminate amount that may be *advanced by the mortgagee* in protection of the mortgaged premise or the mortgage, including taxes, assessments, charges, claims, fines impositions, and insurance premiums; the amounts due upon prior or superior mortgages and other prior or superior liens, encumbrances, and interests; and *legal expenses and attorneys’ fees*.

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<sup>2</sup> *Bus. Bank* did not address whether the mortgage had been satisfied by the Carter payment, noting that that question “relate[d] to the timing of the satisfaction of the mortgage, not to the question before [the supreme court] of whether the mortgage [was] valid.” *Bus. Bank*, 769 N.W.2d at 290, n.7.

Minn. Stat. § 287.05, subd. 4 (2010) (emphasis added). Option One argues that the phrase “advanced by the mortgagee” applies to the phrase “legal expenses and attorneys’ fees” and precludes the addition of any other legal expenses and attorneys’ fees, such as those advanced by Business Bank’s title insurance company. But Option One misreads the statute, which lists three nontaxable items: (1) indeterminate amounts for the protection of the property advanced by the mortgagee; (2) amounts due on prior mortgages or liens, and (3) legal expenses and attorney fees. The phrase “advanced by the mortgagee” is included only in, and applies only to, the first of these. Under the second, amounts due on prior mortgages or liens, whether advanced by the mortgagee, by another entity, or not at all, are not taxable; the same is true of legal expenses and attorney fees.

In any event, chapter 287 of the Minnesota statutes governs the mortgage registry tax and is arguably not relevant to attorney fees on foreclosure, which are governed by chapter 582. “The court shall establish the amount of the attorney’s fee in case of foreclosure by action.” Minn. Stat. § 582.01, subd. 2 (2010). The language of Business Bank’s mortgage reflects this statute: “out of the proceeds arising from such [foreclosure] sale, [Business Bank will] pay . . . all legal costs and charges of such foreclosure, and the maximum attorney’s fees permitted by law, which costs, charges and fees the Mortgagor herein agrees to pay.” Thus, the costs and attorney fees incurred by Business Bank’s title insurance company were “legal costs and charges of such foreclosure” and were properly added to the judgment debt.

The district court's decision to include the mortgage and the costs and fees incurred by Business Bank's title insurance company is affirmed.

**Affirmed.**