

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-728**

Minnwest Bank Metro,
Respondent,

vs.

Komo Group, LLC, et al.,
Appellants,

Kaizen Property Solutions, LLC, et al.,
Defendants.

**Filed December 19, 2011
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-10-16000

Kelly S. Hadac, Sarah Zach, John E. Brandt, Anna Catherine Zanko, Murnane Brandt, St. Paul, Minnesota (for respondent)

Kenneth Hertz, Hertz Law Offices, P.A., Columbia Heights, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellants argue that the district court erred in granting summary judgment in favor of respondent by (1) prioritizing mortgage interests incorrectly, and (2) misinterpreting contract terms. We affirm.

FACTS

This case involves several properties owned by Pamiko Properties, LLC in Ramsey and Hennepin counties. Pamiko acquired property in Ramsey County through executing and delivering a mortgage to MCK Investments, LLC (MCK Mortgage) on January 17, 2008. The MCK Mortgage was recorded on February 12, 2008. On June 24, 2008, Pamiko executed and delivered a mortgage to respondent Minnwest Bank Metro (Minnwest Mortgage) encumbering thirteen properties in Hennepin County; the Minnwest Mortgage was recorded on July 14, 2008. On May 19, 2009, Pamiko and MCK executed an amendment to the MCK Mortgage (MCK Mortgage Amendment), which added the Hennepin properties already mortgaged to Minnwest Bank as additional collateral for the amounts secured by the Ramsey property via the MCK Mortgage. The MCK Mortgage Amendment was recorded on June 8, 2009.

Pamiko eventually defaulted on the Minnwest Mortgage, and respondent foreclosed on the Minnwest Mortgage on October 15, 2009. A sheriff's sale was held on that same day, and respondent purchased six of the thirteen Hennepin properties. At the sheriff's sale, respondent also foreclosed on the MCM Mortgage Amendment, which contained the six purchased properties as collateral for the Ramsey property. The

Sheriff's Certificate of Sale provided a six-month redemption period beginning October 15, 2009. Pamiko redeemed all six Hennepin properties purchased by respondent at the sheriff's sale by April 15, 2010. But Pamiko elected to redeem the properties under respondent's foreclosure of the MCK Mortgage Amendment, in which Pamiko held a junior interest, rather than the Minnwest Mortgage. On May 3, 2010, Pamiko executed and delivered quit-claim deeds for each of the six Hennepin properties redeemed under the MCK Mortgage Amendment to appellant Komo Group, LLC, a company owned by appellant Paul M. Koenig. The quit-claim deeds were recorded that same day.

Respondent initiated this present action on July 2, 2010, seeking a declaratory judgment that: (1) the Minnwest Mortgage was superior to the MCK Mortgage Amendment for the six Hennepin properties; (2) appellants have no interest in the six Hennepin properties; and (3) respondent is the owner of the six Hennepin properties. Respondent moved for summary judgment, and the district court granted each requested declaratory judgment. Regarding the priority of the mortgage interests, the district court determined that the Minnwest Mortgage was recorded prior to the MCK Mortgage Amendment; thus, appellants, as assignees of Pamiko's redemption of the MCK Mortgage Amendment, were not bona fide purchasers entitled to protection under the Minnesota Recording Act. The district court concluded that appellants' junior interests in the properties received via the quit-claim deed from Pamiko were invalid because Pamiko failed to redeem the properties from the foreclosure of the senior Minnwest Mortgage. Accordingly, the district court determined that respondent is the true owner of the six

Hennepin properties and that appellants have no interest in the properties. This appeal follows.

DECISION

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriately 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) (citing Minn. R. Civ. P. 56.03). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *Id.* at 77. We may affirm summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Priority

Appellants argue that the district court erred by concluding that their interests in the Hennepin properties are inferior to respondent’s. Appellants assert that the MCK Mortgage Amendment relates back to the MCK Mortgage, which was recorded prior to the Minnwest Mortgage; accordingly, appellants claim that the MCK Mortgage

Amendment is superior to the Minnwest Mortgage. Because appellants' interests in the properties were redeemed from the senior mortgage, appellants argue that the district court erred in granting declaratory relief to respondent. *See Moore v. Penney*, 141 Minn. 454, 456, 170 N.W. 599, 600 (1919) (stating that in order to preserve any junior rights in a property, a junior creditor must redeem from a senior creditor at foreclosure).

This argument is unavailing. The Minnesota Recording Act states that a bona fide purchaser who first records an interest obtains rights to the property superior to subsequent purchasers and prior purchasers who failed to record. Minn. Stat. § 507.34 (2010); *see also Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 158 (Minn. 2007) (noting that the Minnesota Recording Act establishes that Minnesota is a race-notice jurisdiction, in which a mortgagee who records first, without notice of prior unrecorded claims, has priority). A subsequent purchaser who has actual, implied, or constructive notice of an inconsistent outstanding right of another is not a bona fide purchaser entitled to protection under Minnesota's Recording Act. *Minn. Cent. R.R. Co. v. MCI Telecomm's. Corp.*, 595 N.W.2d 533, 537 (Minn. App. 1999), *review denied* (Minn. Sept. 14, 1999).

Here, respondent provided valuable consideration for the Minnwest Mortgage absent any actual, implied, or constructive notice of another outstanding inconsistent right; indeed, appellants do not contend that respondent's initial interest in the Hennepin properties under the Minnwest Mortgage was obstructed in any way. Thus, respondent became the bona fide purchaser of the Hennepin properties with superior rights to all subsequent purchasers as of the recording date: July 14, 2008. The MCK Mortgage Amendment was recorded with the Hennepin registrar on August 26, 2009. At this point,

MCK was a subsequent purchaser with actual, implied, or constructive notice of respondent's first recorded interest in the Hennepin properties. We see no reason, and appellants cite to no authority, to conclude that respondent's validly recorded interest in the Hennepin properties somehow lost its priority because the properties were included as additional security in an amendment to a previously recorded mortgage to different property. Accordingly, appellants' interests in the Hennepin properties were not properly redeemed from the senior mortgage. The district court did not err in this respect.

Contractual Terms

Appellants also argue that the district court erred by concluding that the language of the MCK Amended Mortgage did not evidence the parties' intent to establish priority of the MCK Amended Mortgage over the Minnwest Mortgage. This is an issue of contract interpretation. "The construction and effect of a contract are questions of law for the court, but where there is ambiguity and construction depends on extrinsic evidence . . . , there is a question of fact for the jury." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract is ambiguous is a question of law that this court reviews de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

Appellants point out that the mortgage was clearly titled "Amendment to Mortgage." Appellants further argue that the text of the document also refers to the contract clearly as a mortgage amendment: the background section notes that the

mortgage-registration tax was already paid, and the MCK Amendment Mortgage clearly states that “all of the original terms of the [MCK Mortgage] shall remain in effect except as amended hereby.” Finally, appellants argue that the parties clearly intended for the amendment to relate back to the original mortgage because respondent omitted the Minnwest Mortgage as an encumbrance that would have potentially hindered the true security provided by the Hennepin properties. *See* Minn. Stat. § 507.20 (2010) (“In all conveyances by deed or mortgage of real estate upon which any encumbrance exists, the grantor . . . shall . . . make known to the grantee the existence and nature of such encumbrance, so far as the grantor has knowledge thereof.”). Based on the title of the document, the language therein, and the omission of the Minnwest Mortgage as an encumbrance, appellants assert that the parties clearly intended the MCK Mortgage Amendment to relate back to the original MCK Mortgage. Accordingly, appellants assert that the district court erred by failing to give full effect to clear and unambiguous contract terms. *See Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 295, 135 N.W.2d 681, 686-87 (1965) (stating that a court must accord full effect to clear and unambiguous contractual language).

Appellants’ arguments are unpersuasive. As respondent asserts, the plain language of the MCK Mortgage Amendment simply provides that: “Grantor and Lender agree that the Mortgage and Assignment are hereby amended so that the Additional Property [in Hennepin County], together with the property [in Ramsey County] shall secure the [existing obligations].” The MCK Mortgage Amendment provided respondent solely with an additional lien on the Hennepin properties. The agreement did not indicate

that respondent's lien was to be superior to any other interest in the property, nor did the agreement alter the priority of MCK's interests in the Ramsey property. Rather, the mortgages were provided as additional securities by Pamiko, and the property interests were intended to be subject to the traditional race-notice principles: first of record is first of right. *See In re Ocwen Fin. Servs., Inc.*, 649 N.W.2d 854, 857 (Minn. App. 2002) (holding that Torrens property registration document numbers "are conclusive evidence of the order in which the mortgages were filed"), *review denied* (Minn. Nov. 19, 2002). There is no clear and unambiguous language in the MCK Mortgage Amendment that would support appellants' assertion that the parties intended to subvert longstanding Minnesota law, and the district court did not error in interpreting the contract.

Affirmed.