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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-296**

Jeffrey L. Nielsen,  
as Trustee for the Beneficiaries of the Universal Assets Trust,  
Respondent,

vs.

Eller Media Company,  
a Delaware corporation licensed to do business in Minnesota,  
d/b/a Clear Channel Outdoor, Inc.,  
defendant and third party plaintiff,  
Appellant,

vs.

Outdoor Advertising Investments, LLC, et al.,  
third party defendants,  
Respondents.

**Filed April 15, 2008  
Affirmed  
Worke, Judge**

Hennepin County District Court  
File No. 27-CV-06-12658

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.\*

## UNPUBLISHED OPINION

**WORKE**, Judge

On appeal from summary judgment in this lease dispute, appellant argues that (1) summary judgment was improper because a fact issue exists regarding whether appellant was fraudulently induced to enter the settlement agreement that ended a prior lawsuit and is the basis of the current dispute, appellant was not allowed to complete discovery, a critical clause in the agreement is ambiguous and the parties' intent is unclear, and the district court granted relief not requested in respondents' summary-judgment motion; and (2) the district court misapplied Minn. Stat. § 508.70 when it ruled that appellant's notice of adverse claim was not properly before the court. We affirm.

### FACTS

In 1995, the predecessors to appellant Eller Media Company, d/b/a Clear Channel Outdoor, Inc. (Clear Channel) and respondent Outdoor Advertising Investments, LLC (Outdoor) entered into two lease agreements to maintain billboards on an easement owned by Outdoor. One of the billboards was later destroyed and litigation ensued over disputed rent. In 2004, the parties settled the matter and entered into a new lease. Following the settlement, Jeffrey L. Nielsen, the owner of Outdoor, transferred rights and

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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.

interests of Outdoor to himself as respondent Trustee for the Beneficiaries of the Universal Assets Trust (Trust). The lease was assigned from Outdoor to the Trust.

In 2006, respondent Redhorse Real Estate, Inc., Universal's agent, notified Clear Channel that it had received offers from unaffiliated third parties to purchase the easement described in the lease, and informed Clear Channel that it had ten days to submit an offer to purchase the easement or it would proceed with another offer. Clear Channel responded that Universal's conclusion that it could cancel the lease if it sold the easement was fundamentally incorrect and that Clear Channel intended to pursue its legal options to protect its rights and interests in the matter. Clear Channel also served and filed a notice of adverse claim.

The Trust filed a declaratory judgment action asking the court to declare that the lease allows for cancellation in conjunction with the sale of the easement to an unaffiliated transferee. Clear Channel moved to dismiss for failure to state a claim upon which relief may be granted and for failure to join a party pursuant to Rule 19. The Trust subsequently moved for summary judgment, invalidation of the adverse claim, and an order for permission to sell and transfer the easement. Finally, Clear Channel filed its answer along with affirmative defenses, a verified counterclaim, and a verified third-party complaint for failure to state a claim upon which relief may be granted.

At a hearing on the motions, Clear Channel argued that it was unable to properly respond to some of the issues raised in the summary judgment motion without discovery. The district court stayed discovery until a decision was reached on the motions.

Following the hearing, the Trust moved to dismiss Clear Channel's counterclaim and third-party complaint, and another hearing on the parties' motions was held.

In December 2006, the district court denied Clear Channel's motion to dismiss, finding that "[Clear Channel's] actions show that a controversy related to the sale of the [e]asement is sufficiently immediate to be justiciable by this Court," and that the Trust stated a claim upon which relief may be granted because the Trust's complaint makes it clear that the notice of adverse claim is invalid because the "leasehold interest in the [e]asement may be terminated at any time" pursuant to the terms of the lease. The district court also found that no genuine issues of material fact existed and granted the Trust's motion for summary judgment. In granting the summary-judgment motion, the district court found that "[the Trust] may terminate the current lease by the sale to an unaffiliated third party. By the clear language of the contract, there is nothing that precludes that the unaffiliated third party be in the business of outdoor advertising." Based on the declaratory judgment, the district court found that the Trust is permitted to contractually sell the easement. Finally, the district court found that

[w]ith the issuance of the declaratory judgment in this case, it is clear that [Clear Channel] would have no property interest against any subsequent purchaser. Therefore this Court finds that there exists no issues of material [fact] and [Clear Channel's] Notice of Adverse Claim is invalid as a matter of law.

The district court granted the Trust's motion to dismiss Clear Channel's counterclaim and third-party complaint based on the finding that Clear Channel failed to state a claim for damages in the counterclaim. This appeal follows.

## DECISION

### *Summary Judgment*

“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. On appeal, the reviewing court must view 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) (citation omitted). “[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Clear Channel first argues that a genuine issue of material fact exists regarding whether the Trust improperly induced Clear Channel into the settlement agreement through fraud or misrepresentation. In response to the declaratory-judgment action, Clear Channel counterclaimed that the Trust improperly induced Clear Channel into the settlement agreement and lease through fraud or misrepresentation because the Trust was negotiating a sale of the easement and intending to cancel the lease at the same time they were negotiating the settlement agreement and lease. The district court dismissed Clear

Channel's counterclaim for failure to state a claim for damages because at the time of the order, Clear Channel was still leasing the easement for the agreed price and terms. The district court found that "[a]ny alleged behind the scenes dealing has not yet affected [Clear Channel's] rights with respect to the Easement" and dismissed Clear Channel's counterclaim without prejudice. The Trust argues that the claims should have been dismissed with prejudice.

In general, an order of the district court dismissing a complaint without prejudice is not appealable. *Sussman v. Sussman*, 287 Minn. 553, 553, 178 N.W.2d 244, 244, (1970). We may exercise review, however, if the order involves the merits of the action or if the dismissal affected the substantial rights of one of the parties. *Fischer v. Perisian*, 251 Minn. 166, 170, 86 N.W.2d 737, 740 (1957). A dismissal with prejudice, even if based on nonsubstantive grounds, is an adjudication on the merits and can form a basis for res judicata. *Johnson v. Hunter*, 447 N.W.2d 871, 873 (Minn. 1989). Because the merits of Clear Channel's claim of fraud or misrepresentation were not addressed, the district court did not err in dismissing Clear Channel's claims without prejudice. This issue is best addressed in the event the Trust sells the easement and cancels the lease. Clear Channel would then have the burden to show that it has been damaged. The district court also did not err in granting summary judgment on the Trust's declaratory-judgment issue without affording Clear Channel the opportunity to conduct discovery because Clear Channel sought to conduct discovery on the issue of fraud or misrepresentation on the part of the Trust rather than on the issue of whether the lease allowed the Trust to cancel the lease in conjunction with a sale of the easement.

Clear Channel also argues that the district court erred in granting summary judgment because the termination clause of the lease is ambiguous and a genuine issue of material fact exists as to the parties' intent. Clear Channel argues that the parties dispute the term "unaffiliated transferee" as well as the parties' intent when entering the agreement. In the declaratory-judgment action, the Trust asked the court to declare that the termination clause allows for the cancellation of the lease in conjunction with the sale of the easement to an unaffiliated party. The termination clause provides: "[The Trust] may cancel this Lease in connection with the sale or conveyance of the Premises to an unaffiliated transferee, subject to the provisions of Paragraph 16 below, upon thirty (30) days advance written notice." Clear Channel moved to dismiss based on a lack of justiciability. The district court denied Clear Channel's motion, finding that a controversy related to the sale of the easement was sufficiently immediate to be justiciable by the court. The district court then found that Clear Channel's argument that the Trust offered no evidence to support the fact that it was in fact the lessor does not create an issue of material fact. The district court found that "[The Trust] may terminate the current lease by the sale to an unaffiliated third party. By the clear language of the contract, there is nothing that precludes that the unaffiliated third party be in the business of outdoor advertising."

"The construction and effect of a contract is [] a question of law unless the contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). If the contract is ambiguous, its interpretation is a question of fact for a jury. *Id.* "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of

more than one interpretation.” *Id.* “Absent ambiguity, the terms of a contract will be given their plain and ordinary meaning and will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms.” *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). When “a contract is unambiguous, a court gives effect to the parties’ intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent.” *Id.* “[W]here a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible.” *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003). Extrinsic evidence may not be used to vary the terms of a written contract when the contract is neither incomplete nor ambiguous. *Id.*

Clear Channel argues that the lease is ambiguous because it does not define “unaffiliated transferee,” and contends that the parties’ intent was to allow cancellation of the lease if it was sold to a person or entity not affiliated with the outdoor-advertising industry. Clear Channel argues that “unaffiliated transferee” is a term of art. *See Minn. & Pac. R.R. Co. v. Sibley*, 2 Minn. 13, 19, 2 Gil. 1, 8 (1858) (“When terms of art or peculiar phrases are used, it must be supposed they are used in the sense as understood by persons familiar and acquainted with such terms.”). However, there is nothing in the record to indicate that “unaffiliated transferee” is a term of art having a meaning separate and apart from its meaning in ordinary use. The Trust argues that the district court correctly found that it means someone not affiliated with the Trust. Under the plain and

ordinary meaning of the term “unaffiliated transferee,” it is not reasonably susceptible of more than one interpretation. The Trust, as the lessor and owner of the easement, would be considered the transferor in the sale of the easement. Therefore, “unaffiliated transferee” is a person or entity not affiliated with the Trust. Simply because Clear Channel disputes the interpretation of the term does not mean that the term is ambiguous. Because the termination clause of the lease is not ambiguous, and no genuine issue of material fact exists, the district court did not err in granting summary judgment in favor of the Trust.

Finally, Clear Channel argues that the district court erred in granting relief not requested by the Trust because it ordered that the lease be cancelled. Clear Channel argues that neither party raised the issue of cancellation. The cancellation issue, however, was an essential element of the Trust’s declaratory judgment action. The Trust requested the court to declare that pursuant to the terms of the lease, it could sell the easement to a person or entity not affiliated with the Trust, and in conjunction with the sale, cancel the lease with Clear Channel. Therefore, Clear Channel’s argument fails.

***Notice of Adverse Claim***

Clear Channel also argues that the district court erred in finding that the notice of adverse claim was invalid and canceled it. The easement at issue here is Torrens property. Clear Channel argues that the district court misapplied Minn. Stat. § 508.70 (2006)—which sets forth the procedure for filing an adverse claim—when it ruled that the adverse claim was not properly before the court. The dispute here is not whether the

proper procedure was followed for the filing of the adverse claim but, rather, whether it should have been filed at all.

Torrens property is held “free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar.” Minn. Stat. § 508.25 (2006). Further, while the statute also provides an exception for “any lease for a period not exceeding three years when there is actual occupation of the premises thereunder[.]” Clear Channel has a leasehold interest in the easement that exceeds three years. *See id.*

(3). Clear Channel’s leasehold interest does not fit any exception to the encumbrances and adverse claims that can be filed against the Torrens property. “Leasehold interests are governed by the terms of the parties’ lease agreements.” *Naegele Outdoor Advertising Co. of Minneapolis v. City of Lakeville*, 532 N.W.2d 249, 252 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). Pursuant to the terms of the lease and declaratory judgment, Clear Channel’s leasehold interest may be terminated at any time in conjunction with a sale of the easement to an unaffiliated transferee. Because the leasehold interest does not constitute an adverse claim allowed under the statute and may be cancelled at any time, the district court did not err in finding that the notice of adverse claim was invalid and canceled it.

**Affirmed.**