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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-948

Kladek, Inc.,
Appellant,

vs.

American Bank of St. Paul,
Respondent.

Filed March 16, 2010
Affirmed
Hudson, Judge

Ramsey County District Court
File No. 62-CV-09-978

Jack E. Pierce, Tracy Halliday, Pierce Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Mitchel C. Chargo, Norman I. Taple, Gurstel, Staloch & Chargo, P.A., Golden Valley, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Crippen, Judge.*

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

HUDSON, Judge

Appellant challenges the district court's dismissal of its breach-of-contract action against respondent bank, alleging that the district court erred by interpreting the parties'

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

loan agreement to allow notice of default to take effect when deposited in the United States mail as first-class mail, which was not registered or certified mail. Because the district court did not err by concluding that the unambiguous language of the agreement allowed respondent to provide notice by depositing the notice in the mail as first class, and respondent followed that procedure in notifying appellant of its default, summary judgment in favor of respondent was proper as a matter of law, and we affirm.

FACTS

In February 2005, appellant Kladek, Inc., by its president, Lawrence F. Kladek (Kladek), borrowed $1,949,900 from respondent American Bank of St. Paul, under the terms of a promissory note and business loan agreement. Kladek also signed a personal guaranty, guaranteeing appellant's obligation on the note.

The note had a stated interest rate of 6.5%, but provided that in the event of appellant's default, respondent was entitled to increase the interest rate by four percentage points. The note defined default as failure to make payment when due, or failure to comply with any "term, obligation, covenant or condition" contained in the note or related documents. The loan agreement required that appellant furnish respondent with tax returns as soon as they were available, but no later than 30 days after the end of the applicable filing date for the end of the tax-reporting period. It also provided that if a default, other than a default on indebtedness, was curable, and the borrower had not been given notice of a similar default within the previous 12 months, the borrower could cure the default "after receiving written notice from Lender demanding cure." The loan agreement stated:

> Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, *or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid,* directed to the addresses shown near the beginning of this Agreement.

(Emphasis added.)

Respondent did not receive appellant's corporate tax returns for the years 2003, 2004, and 2005, or Kladek's personal tax returns for 2004 and 2005. On July 5, 2006, December 15, 2006, and December 29, 2006, respondent deposited in the United States mail, first class, three successive letters to Kladek at the address stated on the loan documents. The letters, taken together, informed Kladek that the tax returns were needed as required by the loan agreement and that failure to immediately comply could result in having the default rate imposed. Respondent did not send the letters by certified or registered mail. Respondent followed its internal mailing policies in mailing the letters and did not receive them back as returned to sender.

By January 2007, appellant had not cured its default, and respondent raised the interest rate on the note four percentage points, to 10.5%. In about October 2007, appellant cured its default by providing the tax returns, and the original interest rate was reinstated.

In February 2009, appellant filed a complaint in Ramsey County District Court, alleging that respondent breached its contract by charging increased interest on the note when respondent did not provide notice of default that was actually delivered to

appellant. Respondent moved to dismiss the action under Minn. R. Civ. P. 12.02(e), alleging that the complaint failed to state a claim under which relief could be granted because respondent provided proper notice of appellant's default by first-class mail and increased the interest rate when appellant failed to cure its default. Respondent submitted affidavits of two bank employees stating that they had discussed appellant's default with Kladek, who was aware of the default. Appellant submitted Kladek's affidavit; Kladek contended that he never received the letters notifying appellant of the default.

The district court granted respondent's motion, concluding that the unambiguous language of the loan agreement did not require actual delivery of notices to appellant, but that the notices were effective if, among other options, they were mailed either by (1) first class, (2) certified, or (3) registered mail, postage prepaid. The court concluded that respondent provided three proper notices of default to appellant by depositing them in the United States mail, first class. The court concluded that the action was dismissed as a matter of law and granted respondent attorneys' fees, costs and expenses as provided by the loan agreement. This appeal follows.

D E C I S I O N

I

On a motion to dismiss for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e), the district court may generally consider only the complaint and the documents referenced in the complaint. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000). If the parties present, and the district court does not exclude, matters outside the pleading, the motion is treated as one for

summary judgment. Minn. R. Civ. P. 12.02; *see N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004) (applying summary-judgment standard on review after concluding that district court erred by failing to analyze rule 12.02(e) motion as motion for summary judgment when it considered affidavits from both parties). "[W]hen the complaint refers to the contract and the contract is central to the claims alleged," the district court may consider the entire written contract. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995) (permitting consideration of contract provisions other than those cited in complaint in rule 12.02(e) motion).

Here, the complaint referred to the "loan documents." Appellant submitted the note as an exhibit to the complaint; respondent submitted the loan agreement and the guaranty as exhibits supporting its motion to dismiss. Because these loan documents were referenced in the complaint and relate directly to appellant's claim for relief, the district court properly reviewed them in considering respondent's motion to dismiss.

But respondent also submitted to the district court two affidavits from bank employees referring to discussions with Kladek to support respondent's argument that Kladek received notice of default. Appellant also submitted Kladek's affidavit, which stated that he did not receive respondent's letters of default. The district court did not exclude these documents. Because the district court received this additional evidence beyond the complaint and the materials referenced in the complaint, the district court erred by ruling on respondent's motion as a motion to dismiss, rather than a motion for

summary judgment, and we review the matter as an appeal taken from summary judgment.

II

In reviewing a ruling on summary judgment, this court determines whether a genuine issue of material fact exists and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). Absent ambiguity, contract interpretation presents a question of law, which is subject to de novo review. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998).

"Unambiguous contract language must be given its plain and ordinary meaning . . . ." *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). "[W]hen 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." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). Contract language should be construed as a whole, with all clauses interpreted to be meaningful. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525–26 (Minn. 1990).

The district court concluded that the loan agreement unambiguously provided that notice of default was effective when, among other options, it was "(i) deposited in the United States Mail, as first class; (ii) certified; or (iii) registered mail postage prepaid." Thus, the district court concluded that notice of default is effective if respondent deposits the notice in the mail, sent by first class mail, or, *in the alternative*, certified or registered

mail. Appellant argues that the district court erred in its interpretation and that the notice provision means instead that "registered or certified mail" is a *subset* of first-class mail, so that first-class mail must also be sent either as registered or certified mail for notice to be effective on mailing.

In reviewing a contract, we may examine its meaning according to the rules of grammar. *See Mattson v. Flynn*, 216 Minn. 354, 359, 13 N.W.2d 11, 14 (1944) (stating that statutes are construed in accordance with the rules of grammar unless contrary to legislature's intent). Appellant urges an interpretation of the loan agreement that relies on the grammatical rule that if a sentence lists more than two items in a series, the last item must be preceded by a comma. *See Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn. App. 1994) (describing rule), *review denied* (Minn. Feb. 24, 1994). But this rule is not universally applied. *Id*. Therefore, it does not dictate our analysis. *See id*. (declining to apply rules of comma usage to interpret statute). A stronger factor in our plain reading analysis is that the words "first class" directly follow the words "when deposited in the United States mail, as . . . ." This immediate pairing of the words "as" and "first class," which are then followed by the words "certified or registered mail," supports the district court's determination that first-class mail is one of three parallel options for giving notice.

Appellant also argues that the provisions of the documents must be read together; that the loan agreement and note both allow appellant to cure a default after receiving written notice; and that the notice provision, if defined to include registered or certified mail, but not first-class mail, ensures that appellant would actually receive notice of the

default. But this reading is inconsistent with the plain language of the agreement's notice provision, which states that notice is effective when actually delivered; when actually received by telefascimile; when deposited with a nationally recognized overnight courier; or, in certain cases, when deposited in United States mail. Appellant's interpretation would render meaningless the portion of the agreement stating that notice may be effective in certain cases when sent by courier or deposited in the United States mail. *See Chergosky*, 463 N.W.2d at 526 (stating that courts attempt to avoid interpretation of contract that would render a provision meaningless).

Further, even if we were to determine that the agreement was ambiguous, we would reach the same result. To aid in our reading of the agreement, we may take judicial notice of the United States Post Office's regulations. *See Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004) (citing postal service website). The United States Post Office website indicates that both certified and registered mail may be used with either priority mail or first-class mail.[1] Appellant's interpretation of the language in the agreement would unreasonably exclude priority mail, which may also be sent certified or registered, and which would presumably be more reliable in reaching the borrower. And in other contexts, when service by mail is permitted, it is generally effective when mailed. *See, e.g.*, Minn. R. Civ. P. 5.02 (stating that under rules of civil procedure, service of notice by mail on a party or a party's attorney is "complete upon mailing"). Therefore, the district court did not err in determining that depositing notice

[1]*See* usps.com/send/waystosendmail/extraservices/certifiedmailservice.htm; usps.com/send/waystosendmail/extraservices/registeredmailservice.htm (last visited Feb. 26, 2009).

of default in the first-class mail, postage prepaid, is an acceptable form of giving notice under the agreement, and respondent adequately notified appellant of its default. We conclude that summary judgment was proper in favor of respondent.

Affirmed.