STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0939

Kanabec State Bank,
Respondent,

vs.

Daniel Olean,
Appellant.

Filed February 3, 2014
Affirmed
Hudson, Judge

Pine County District Court
File No. 58-CV-11-729

Daniel L. M. Kennedy, Kennedy Law Group, PLLC, Minneapolis, Minnesota (for appellant)

Stephanie A. Ball, Eric S. Johnson, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk, Judge.

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

HUDSON, Judge

In this replevin action, appellant-debtor Daniel Olean argues that the district court (a) should have awarded him the surplus created when respondent Kanabec State Bank made excessive bids at a sale foreclosing certain real property; (b) should have

recognized the existence of ambiguities in the parties' mediated settlement agreement; (c) should have awarded Olean attorney fees under the Farmer-Lender Mediation Act; and (d) overstated Kanabec State Bank's attorney-fee award. We affirm.

FACTS

This appeal is from one of three actions arising out of defaults by Olean on three promissory notes to Kanabec State Bank (the bank). After Olean's default, he and the bank entered mediation under the Farmer-Lender Mediation Act (FLMA), Minn. Stat. §§ 583.20-.32 (2010).[1] The parties reached a mediated agreement stating that, "subject to" the approvals of the bank's loan and credit committees,[2] the bank would make two new loans to Olean. The bank's loan and credit committees did not approve the loans, the bank did not make the loans, and the mediator filed an affidavit stating that the bank failed to participate in the mediation in good faith. Olean then started an action (the mediation action) by petitioning the district court to find that the bank's actions constituted fraud and bad faith and asserting that the bank had to make the new loans because the approvals of the loan and credit committees were supposed to be mere formalities. The mediation court ruled that the parties' disagreement regarding their mediated agreement did not show bad faith by the bank, that the mediator abused his discretion by filing the affidavit, and directed the parties back to mediation.

[1] The FLMA expired on June 30, 2013. *See* Minn. Stat. § 583.215 (2012).

[2] Based on counsels' statements at oral argument, there is a question about whether the bank's loan and credit committees are separate entities or are separate names for the same entity. Because the parties' mediated agreement referred to loan and credit committees, this opinion does as well. We note, however, that our decision would be the same whether or not the bank has separate loan and credit committees.

When the restarted mediation was unsuccessful, the bank sought to collect on the collateral securing the notes. For one note, the collateral was real property, for another it was chattel property, and for the third it was both real and chattel property. The bank's collection efforts included this second action (the replevin action), seeking to obtain possession of the chattel property, including prejudgment replevin. This replevin action was heard by the same district court judge who heard the mediation action. On February 16, 2012, the district court granted the bank's motion for prejudgment replevin.

While the parties argued in the replevin action regarding whether the bank's ability to seize the chattels would be stayed, the bank, at a foreclosure sale, bought all eleven parcels of the mortgaged real property. The bank also stopped pursuing replevin of the chattels securing the note involving both real and chattel property.

The bank's bids at the foreclosure sale were overstated, and the bank started a third action, this one to reform the sheriff's certificates for the foreclosed properties to reflect corrected, lower bids. This reformation action was heard by a different judge. In June 2012, Olean redeemed nine of the eleven properties the bank bought at the foreclosure sale and redeemed them for the amounts in the bank's original bids. After Olean redeemed the properties, he filed an answer and counterclaim in the bank's reformation action, seeking to recover the "surplus" allegedly generated by the bank's initial overbids.

In August 2012, in the replevin action, the district court heard the parties' various motions. The result was a November 2012 order for partial summary judgment in which the replevin court granted the bank summary judgment and dismissed Olean's

counterclaims. That order rejected Olean's argument that the bank's bids at the foreclosure sale created a surplus, rejected Olean's argument that the mediated settlement agreement required the bank to make the new loans to Olean, awarded the bank attorney fees for its collection efforts, and declined to award Olean attorney fees for the bank's conduct in mediation. Olean appeals the final judgment entered in March 2013. In the meantime, the reformation court ruled against Olean in the reformation action; this court affirmed the reformation court's ruling in that case. *See Kanabec State Bank v. Olean*, No. A13-0100 (Minn. App. Dec. 30, 2013).

D E C I S I O N

Appellate courts "review de novo the district court's grant of summary judgment to determine whether genuine issues of material fact exist and whether the district court erred in applying the law. Statutory interpretation presents a question of law subject to de novo review." *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013) (citations omitted).

I

In this appeal, Olean makes arguments regarding the existence and proper disposition of surpluses purportedly created by the bank's initial overbids at the sales foreclosing the real property. The existence of a surplus arising from the foreclosures, however, depends on the bids made at the foreclosure sales. And we have previously affirmed the reformation court's grant of the bank's request to reform the bids the bank made at the foreclosure sale. Thus, there were no surpluses generated by the bank's foreclosures of the real estate. Moreover, this appeal in the replevin action is the

incorrect appeal in which to assert the existence of a surplus arising from the foreclosure of real property.

Olean also asserts that the district court failed to address his argument that the bank "could not engage in both foreclosure by advertisement and replevin on the [ ] loan [secured by both real and chattel property.]" While the bank initially sought both foreclosure on real property and replevin of chattel property securing one note, after the bank foreclosed the mortgage, it abandoned replevin under that note. Therefore, we need not address this question.

II

The parties' mediated agreement states that the bank would loan Olean $260,000; that "[t]his loan is *subject to* approval by the bank's loan committee"; that the bank also would provide Olean with a $65,000 line of credit, "pending approval by the Farm Service Agency for a $65,000 direct loan"; and that "[t]he bank's loan is *subject to* approval by the bank's credit committee." (Emphasis added.) In district court, Olean asserted that these provisions in the mediated agreement were ambiguous and created a fact question precluding summary judgment because he understood the approvals of the loan and credit committees to be "mere formalit[ies]." The district court rejected Olean's argument, stating that "subject to" meant that the loans were "contingent upon" conditions that did not occur, and that "[b]ecause the conditions were not met, [the bank] did not breach contract by not issuing the loans negotiated for at the May 18, 2011 mediation."

A. Ambiguity

Olean argues that the district court erred in ruling that the mediated settlement agreement's use of "subject to" made approvals of the bank's loan and credit committees a condition precedent to making the loans. Whether a contract provision is ambiguous is a legal question, which appellate courts review de novo. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982); *Blackburn, Nickels, & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 643 (Minn. App. 1985), *review denied* (Minn. June 24, 1985). A provision is ambiguous if, based solely on its language, it is reasonably susceptible to more than one meaning. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). If a contract provision is ambiguous, the meaning of that provision is a question of fact. *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).

Construing an agreement that was "subject to" cancellation of a prior agreement, the supreme court stated that "[u]se of the language, 'subject to,' indicates that cancellation of the [prior] agreement was intended to be a condition precedent to the [ ] agreement." *Hehl v. Klotter's Estate*, 277 N.W.2d 660, 662-63 (Minn. 1979). Thus, the replevin court's reading of "subject to" in the mediated agreement to mean "contingent upon," is consistent with caselaw, and, in the context of the mediated agreement, "subject to" makes any new loans to Olean by the bank "contingent upon" the approvals of the bank's loan and credit committees.

Olean argues that making the bank's new loans to him contingent on the approvals of the loan and credit committees is inconsistent with how "Olean's other loans [had

been] approved by the bank." This argument, however, is not based on the language of the agreement but on what Olean alleges was the parties' prior conduct. Thus, Olean's argument does not show ambiguity of the agreement's language: "A contract is ambiguous if, *based upon its language alone*, it is reasonably susceptible of more than one interpretation." *Denelsbeck*, 666 N.W.2d at 346 (quoting *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997) (emphasis added)). The district court did not err in ruling that the mediated agreement unambiguously made the bank's new loans to Olean contingent on the approvals of its loan and credit committees.

B. FLMA

Under the FLMA, "[t]he parties must engage in mediation in good faith. Not participating in good faith includes . . . failure of the creditor to designate a representative to participate in the mediation with authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter[.]" Minn. Stat. § 583.27, subd. 1(a)(3) (2012). Olean asserts that the district court's reading of "subject to" undermines this provision of the FLMA because, under the district court's interpretation, the mediated agreement would not be "binding." In its September 2011 order, the mediation court ruled:

> The [FLMA] does not state that a mediated agreement has to be implemented within 24 hours, or in this case, that the [b]ank was required to give [Olean] a loan within 24 hours. Instead, the statute states that the [b]ank was required to have someone present during the negotiations that had the authority to bind the [b]ank to a mediated agreement. The [b]ank met this requirement as [its office] had the necessary authority.

In civil cases, challenges to prior final orders generally amount to an improper collateral attack on a prior ruling. *See Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. App. 1996) (stating that Minnesota law does not permit a collateral attack on facially valid judgments, that judgments alleged to be merely erroneous are "not subject to attack," and that public policy favors the finality of judgments), *review denied* (Minn. Feb. 26, 1997). Here, Olean's argument to the replevin court and to this court that an agreement making the loans contingent on the approval of the bank's loan and credit committees violates Minn. Stat. § 583.27, subd. 1(a)(3), and is a collateral attack on the mediation court's ruling. We therefore decline to address it in this appeal in the replevin action.

C. Enforcement of mediated settlement agreement

Olean argues that "failure of a conditional approval of a loan only excuses performance when the approval is from a third party[,]" and that, because the bank is not a third party to the mediated settlement agreement, the bank's failure to approve the loans does not excuse its failure to make those loans. This argument is based on the idea that "[i]f a party to a contract unjustifiably prevents the occurrence of a condition precedent, then that party's duty to perform is not excused." *Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 300 (Minn. App. 2004) (citing *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502-03 (Minn. 1995)). We reject Olean's argument. While the general rule is that a party preventing the occurrence of a condition precedent is not excused from performance, an exception exists: preventing a condition precedent "may be justified by the pecuniary circumstances of the other party."

Minnwest Bank Cent., 689 N.W.2d at 300 (citing *Nodland v. Chirpich*, 307 Minn. 360, 366, 240 N.W.2d 513, 516 (1976)). Here, because Olean was in default on several loans, his pecuniary circumstances were suspect. Further, the bank was to provide Olean with a $65,000 line of credit, "pending approval by the Farm Service Agency for a $65,000 direct loan[.]" The Farm Service Agency, however, never approved a $65,000 direct loan to Olean.[3] Thus, a third party to the mediation agreement (the Farm Service Agency) did, in fact, render a condition precedent to the $65,000 loan unfulfilled.

III

Olean argues that the district court's award of $25,429 to the bank, as reasonable attorney fees incurred in collecting on the note secured by chattel property, is excessive. Fee awards are not altered on appeal absent an abuse of the district court's discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The bank's billing sheets include a $112.50 entry for 0.75 hours of work on December 27, 2011. The work done addressed three topics, one of which is foreclosure-related work. Olean asserts that this entry shows that the bank improperly sought fees for the foreclosures in addition to replevin-related fees. The bank notes that, if Olean is correct, the error is $37.50; one-third of $112.50. Generally, de minimis errors do not require a remand. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 776 N.W.2d

[3] This is an uncontroverted assertion in the bank's brief. *See Loth v. Loth*, 227 Minn. 387, 399, 35 N.W.2d 542, 550 (1949) (noting that "[a]n apparent exception to the rule [that appellate courts limit their consideration to what is in the appellate record] is that an uncontroverted statement in appellee's or respondent's brief or argument will be taken as true"); *Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 724 n.1 (Minn. App. 1995) (stating uncontroverted statement in a party's brief may be accepted as true) (citing *Loth*).

172, 179 (Minn. App. 2009); *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985). A $37.50 error in a $25,429 award is de minimis.[4] We apply the same rationale to Olean's argument regarding what is apparently one quarter ($28.50) of a $114 billing item on February 22, 2012.

Olean also asserts that "the bank claimed the same fees related to replevin through the foreclosures." If Olean is correct, his assertion is that the fee awards for the mortgage foreclosures are excessive. Any error in the awards for the foreclosures should be addressed in a proceeding addressing those foreclosures, not in this replevin proceeding.

Referring to both the billing item on February 22, 2012, and an item on March 23, 2012, for $570.00, Olean argues that they include fees for non-collection costs regarding responses to his counterclaims. Work on Olean's counterclaims is one of the four topics mentioned for the work done on February 22, 2012, and the only topic mentioned for the March 23, 2012, entry. As the bank notes, however, all but one of Olean's counterclaims were based on the bank's failure to make the loans discussed by the parties in mediation and whether that failure was a defense to the bank's ability to collect; the other counterclaim was for attorney fees. Thus, except for the fees associated with Olean's counterclaim for attorney fees, the fees associated with Olean's counterclaims involve the bank's ability to collect under the note secured by only chattel property, and therefore are

[4] In his reply brief, Olean asserts that the December 27, 2011, entry "is but a single example of the larger problem with the lower court's order . . .," but does not identify other allegedly erroneous entries. It is not this court's role to independently assess the propriety of each item on the twelve pages of billing sheets submitted by the bank or to seek out other potential problems or errors. Rather, to obtain reversal, an *appellant* must *show* error by the district court *and* prejudice arising from that error. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987).

includable in the bank's fee award. And Olean has not shown that the fees associated with the March 23, 2012, entry are not de minimis.

In his reply brief, Olean argues that this replevin action initially involved the bank seeking replevin under both notes secured by chattel property, and that the bank, when seeking fees, failed to distinguish the fees generated for seeking replevin under the note secured by real and chattel property (which Olean asserts are not recoverable here) and the fees generated for seeking replevin under the note secured only by chattel property (which he admits are recoverable). Because this argument was not made in Olean's principal brief, it is not properly before this court, and we decline to address it. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not addressed in a principal brief are "waived and cannot be revived by addressing them in the reply brief"), *review denied* (Minn. Sept. 28, 1990).

IV

In this replevin action, Olean asserted to the district court that, under Minn. Stat. § 583.27, subd. 3 (2010), the existence of the mediator's affidavit stating that the bank acted in bad faith in the mediation entitles him to attorney fees for the mediation proceeding. The replevin court rejected Olean's argument for four distinct reasons, including the fact that the mediation court ruled that the bank did not participate in the mediation in bad faith. In this court, Olean challenges the denial of fees but only addresses one of the four bases on which the replevin court rejected his request. Because he does not challenge the district court's other bases for its ruling, we will not reverse that ruling. Moreover, Olean's argument amounts to an improper collateral attack on the

mediation court's finding that the bank did not, in fact, participate in the mediation in bad faith, the question is not properly before this court in this replevin appeal.

Affirmed.