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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0385**

Linda King,
Appellant,

vs.

2003 Silverado 1500, VIN *****6662,
Respondent.

**Filed November 20, 2017
Affirmed
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19AV-CV-16-621

John G. Westrick, Westrick & McDowall-Nix, PLLP, St. Paul, Minnesota (for appellant)

Amy B. Schutt, Campbell Knutson, P.A., Eagan, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Linda King appeals the district court's decision that her son's truck is subject to forfeiture under Minn. Stat. § 169A.63 (2016). The truck was seized for forfeiture following her son's arrest for second-degree driving while impaired. King, along with her son, was a borrower on the loan for the truck. King argues that she has the right

to possess the truck under the Uniform Commercial Code (U.C.C.). Her argument depends on her being a secondary obligor and being subrogated to the rights of the lender. The district court, following a court trial, determined that King was neither. Because the district court did not err in its determinations and findings, we affirm.

FACTS

King's son was arrested for second-degree driving while impaired, and the City of Lakeville seized for forfeiture the truck he was driving. Prior to this arrest, both King and her son signed loan documents, consisting of a loan agreement and a security agreement, with Toro Employees Federal Credit Union (Credit Union). The loan documents list the truck as collateral for the loan. King's son signed as "Borrower 1" and King signed as "Borrower 2." One of the terms of the security agreement provides that forfeiture of the truck constitutes a default under the agreement. The truck is titled in King's son's name alone. King testified that, although her son was initially making payments on the loan account, she began making payments following his arrest.

Minn. Stat. § 169A.63 provides for the forfeiture of vehicles that have been used in connection with certain "designated offense[s]" including driving-while-impaired crimes. *Id.*, subd. 1(e). A vehicle may be seized following a lawful arrest. *Id.*, subd. 2(b)(1). After the seizure, the driver and each individual "known to have an ownership, possessory, or security interest" are to receive notice of the seizure and of the government's determination that the vehicle is subject to forfeiture. *Id.*, subd. 8(b). If none of these individuals challenges the forfeiture within 60 days, the vehicle is "administratively forfeited." *Id.*, subds. 8(e) (providing for the fate of vehicles subject to forfeiture), 10(a) (defining

administratively forfeited). Generally, forfeited vehicles are either kept by the government or sold, with sale proceeds distributed to any parties with security interests in the vehicles, minus the expenses for “seizure, towing, storage, forfeiture and sale.” *Id.*, subds. 10(a), 10(b), 7(b).¹

In her original complaint, King sought relief from forfeiture of the truck on the theory that she was an “innocent owner” and requested the release of the truck to the Credit Union to satisfy the outstanding loan obligation. At trial, she abandoned this theory and instead argued that she personally has a right to possession of the vehicle as a secondary obligor or guarantor asserting the rights of the Credit Union. Despite King’s change of argument and requested remedy at trial, the district court addressed King’s new argument.

The district court determined that King was a co-borrower and a primary debtor on the loan, and not a secondary obligor or guarantor, based on the language of the loan documents. The district court also found that King is not subrogated to the rights of the Credit Union. Based on the above, the district court concluded that King failed to meet her burden of proving an adequate defense and that the truck should remain subject to forfeiture under Minn. Stat. § 169A.63.

King appeals.

¹ Minn. Stat. § 169A.63, subd. 11, permits a secured party to request the return of a vehicle in order to sell it to satisfy the secured debt within 30 days of receiving notice of the vehicle’s seizure and forfeiture. King does not argue this subdivision applies, and so we do not address it in our decision.

DECISION

King argues that the district court erred by determining that the truck is subject to forfeiture under Minn. Stat. § 169A.63. We review questions of law de novo. *Nielsen v. 2003 Honda Accord*, 823 N.W.2d 347, 349 (Minn. App. 2012), *aff'd*, 845 N.W.2d 754 (Minn. 2013). Appellate courts “review the district court’s factual findings for clear error.” *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). “‘Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous.’” *City of Golden Valley v. One 1998 Pontiac Grand Prix, VIN No. 1G2WP521WF309530*, 616 N.W.2d 780, 782 (Minn. App. 2000) (quoting Minn. R. Civ. P. 52.01). “Findings of fact are considered clearly erroneous only if they are not reasonably supported by the evidence.” *City of Golden Valley*, 616 N.W.2d at 782 (quotation omitted).

Broadly, King argues that she is a secondary obligor² on the loan documents and is subrogated to the Credit Union’s rights through her payments on the loan.³ She contends that the Credit Union has the right to possess the truck because King’s son defaulted on the loan when the vehicle was seized. She further argues that she may exercise that right to possession as a subrogated party asserting the subrogor’s rights in the collateral under the

² King uses the terms “secondary obligor” and “guarantor” interchangeably in her briefing and focuses her argument on U.C.C. provisions that use only the term “secondary obligor.” *See, eg.*, Minn. Stat. §§ 336.9-102 (providing definition for secondary obligor, but not guarantor), .9-618 (outlining the rights and obligations of secondary obligors) (2016).

³ King also argues that she is an “accommodation party” entitled to an assignment of the loan collateral under the U.C.C. Because this issue was raised for the first time on appeal, we decline to address it. *See Annis v. Annis*, 250 Minn. 256, 263, 84 N.W.2d 256, 261 (1957) (“[L]itigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below.”).

U.C.C. King’s argument relies on the proposition that a secured party has a right to possession of a forfeited vehicle under the U.C.C., despite the apparently conflicting language of the forfeiture statute, which provides a procedure for the disposition of forfeited vehicles and specifically addresses the disposition of vehicles that are subject to a security interest. The city argues that the forfeiture statute, and not the U.C.C., governs. We need not decide whether King’s U.C.C. theory has any merit because, as explained below, the district court did not err in determining that King is not a secondary obligor and that she is not subrogated to the rights of the Credit Union.

A. The district court did not err in determining that King is not a secondary obligor.

King argues that the district court erred in determining that she was primarily liable on the debt and not secondarily liable as she asserts. The U.C.C. defines a “secondary obligor” as “an obligor to the extent that: (A) the obligor’s obligation is secondary; or (B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.” Minn. Stat. § 336.9-102, subd. (a)(72). The U.C.C. defines an “obligor” as an individual who,

with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation.

Minn. Stat. § 336.9-102, subd. (a)(59).

King meets the definition of an obligor because she is someone who “owes payment or other performance” of the loan obligation. *See* Minn. Stat. § 336.9-102, subd. (a)(59) (defining “obligor”). But the record supports the district court’s determination that she is not a secondary obligor, under either (A) the secondary-obligation prong or (B) the right-of-recourse prong of the definition. *See* Minn. Stat. § 336.9-102, subd. (a)(72) (defining “secondary obligor”).

We address the right-of-recourse prong first. Because no provision in the loan documents provides King with a right of recourse against her son or his property with respect to the loan obligation with the Credit Union and King does not argue she has such a right, King is not a secondary obligor under that prong of the definition.

Second, as to the secondary-obligation prong, the district court concluded that King’s obligation is not secondary to her son’s. The loan documents signed by the parties describe their obligations under the documents. The loan agreement states, “Each person who signs, or otherwise authenticates this Agreement will be individually and jointly responsible for paying the entire amount owed under this Agreement. This means we can enforce our rights against any one of you individually or against all of you together.” And the loan agreement has language near the beginning of the agreement stating, “All references to ‘you,’ or ‘your’ mean each person who signs, or otherwise authenticates, this Agreement as a borrower.” The security agreement contains similar language. The plain language of the loan documents indicates that King is in the same position of liability on the loan obligation as her son—that is, primarily liable. There is no language in the loan documents to suggest she has any other status. *See Currie State Bank v. Schmitz*, 628

N.W.2d 205, 208-09 (Minn. App. 2001) (finding a party to an ambiguous agreement to be secondarily liable when language in the “notice to the cosigner” section said, “You are being asked to guarantee this debt). The district court’s determination that King is primarily liable for the loan obligation, and is therefore not a secondary obligor, is supported by the plain language of the loan documents. As such, the determination is not erroneous.

B. The district court did not clearly err in finding that King is not subrogated to the rights of the Credit Union as a secondary obligor.

Regardless of whether King is a secondary obligor, she still cannot succeed under her theory unless she is subrogated to the rights of the Credit Union. King argues that, because she assumed payments on the loan, she is subrogated to the rights of the Credit Union.

“A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after the secondary obligor . . . is subrogated to the rights of a secured party with respect to collateral.” Minn. Stat. § 336.9-618. “There are two types of subrogation: equitable and conventional.” *Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 818 (Minn. 2016). Conventional subrogation arises out of a “contractual” obligation. *Id.* Under the doctrine of equitable subrogation, “a person who has discharged the debt of another may succeed in substitution to the rights and position of the satisfied creditor.” *Wells Fargo Home Mortg., Inc. v. Chojnacki*, 668 N.W.2d 1, 5 (Minn. App. 2003). Equitable subrogation applies where “(1) the party seeking subrogation has acted under a justifiable or excusable mistake of fact and (2) injury to innocent parties will

otherwise result.” *Id.* Generally, without clear contractual terms stating otherwise, subrogation “will be denied prior to full recovery.” *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983). Because King makes no argument that conventional subrogation applies in her case, and nothing in the record indicates a contractual agreement between King and her son or between King and the Credit Union regarding subrogation, our analysis here focuses on whether equitable subrogation applies.

For these reasons, the record evidence supports the district court’s finding that King is not subrogated to the rights of the Credit Union. First, King has not acted under any “mistake of fact” making her eligible for equitable subrogation. *See Wells Fargo Home Mortg., Inc.*, 668 N.W.2d at 5 She signed the loan documents in which she agreed to be liable for the debt with the Credit Union and is now intentionally paying that debt. Second, there are no “innocent parties” that would be injured if King were not compensated for the debt. *See id.* Again, King voluntarily agreed to be liable for the loan amount by signing the loan documents and cannot now claim to be an innocent party injured by making payments on the debt she agreed to pay. Third, King has only paid a portion of the debt. She has continued to make monthly payments on the remaining loan balance but has not paid the loan in full. Thus, the Credit Union has not made a “full recovery,” permitting King to be equitably subrogated to its rights. *See Westendorf*, 330 N.W.2d at 703. The evidence in the record reasonably supports the district court’s finding that King is not subrogated to the rights of the Credit Union, and the district court’s finding is not clearly erroneous.

Because the district court did not err in determining that King is not a secondary obligor and is not subrogated to the rights of the Credit Union, we affirm the district court's determination that the truck remains subject to forfeiture.

Affirmed.