

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS**

A18-1680

A18-1870

Thomas M. Fafinski, P.A., as successor in interest
for and f/k/a BenePartum Law Group, P.A.,
Appellant,

vs.

Melrose Community, LLC,
Respondent,

Profinium, Inc.,
Respondent,

Security Bank Waconia n/k/a Security Bank & Trust Co.,
Respondent,

Arvig Enterprises, Inc.,
Respondent,

County of Stearns,
Defendant,

City of Melrose,
Respondent,

Sauk River Watershed District, et al.,
Defendants,

And Melrose Community, LLC,
Third-Party Plaintiff,

vs.

Judy Adams, third-party defendant,
Respondent.

Filed May 28, 2019
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CV-16-2530

Nathan W. Nelson, Steven V. Rose, Virtus Law, PLLC, Brooklyn Park, Minnesota (for appellant)

Sarah R. Jewell, Derek C. Harvieux, Franz Hultgren Evenson, P.A., St. Cloud, Minnesota (for respondent Melrose Community)

Andrew A. Willaert, Christopher J. Kamath, Gislason & Hunter LLP, Mankato, Minnesota (for respondent Profinium, Inc.)

Security Bank Waconia, Glencoe, Minnesota (respondent)

Arvig Enterprises, Inc., Perham, Minnesota (respondent)

Scott Dymoke, Dymoke Law Office, P.A., Melrose, Minnesota (for respondent City of Melrose)

Judy Adams, Lino Lakes, Minnesota (pro se respondent)

Considered and decided by Connolly, Presiding Judge; Slieter, Judge; and Smith, John, Judge.*

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

CONNOLLY, Judge

Appellant, a law firm, challenges the district court's finding that the mortgages underlying appellant's foreclosure action failed for lack of consideration; it also challenges

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

the denial of appellant's alternative motions for amended findings of fact, conclusions of law, order, and order for judgment or for a new trial. Because the district court's findings were not clearly erroneous and there was no abuse of discretion in the denial of appellant's motions, we affirm.

FACTS

In March 2001, Rose Park, LLC (RP), an entity owned by third-party defendant Judy Adams, signed a contract for deed for a mobile home park and some vacant land (the properties), for \$50,000 up front and \$500,000 in monthly payments. The contract for deed provided that the vendors, John and Linda Klein (the Kleins), would retain legal title to the properties until the contract was paid off, when they would tender a warranty deed. The contract for deed was recorded. In November 2002, RP assigned its vendee's interest in the contract to Adams.

In 2003, Adams retained the BenePartum Law Group, P.A., headed by Thomas Fafinski and predecessor in interest to appellant Thomas M. Fafinski, P.A., to represent her in various corporate, business, and personal matters. She became indebted to BenePartum for legal services.

On April 14, 2004, Adams executed a promissory note for \$61,205.45 in favor of BenePartum. The note, which had no due date, repayment plan, or repayment period, provided that: (1) principal and interest would be due within 30 days upon written demand from the creditor; (2) payments would be applied first to interest, then to principal; and (3) the note was in partial satisfaction of "the twelve (12) separate Combination Mortgages between the parties (the Mortgages) (attached hereto as Exhibit A)." No mortgages were

attached to the note as exhibit A; the last page of the note is headed “**Exhibit A**” over the phrase “(Mortgages Attached Hereto)” but is otherwise blank. The note further provided that the debtor’s obligations under it were secured “pursuant to those Mortgages between the Debtor [i.e., Adams] and Creditor [i.e., BenePartum], of even date herewith.” No evidence has been produced of any April 14, 2004, mortgage or any mortgage “of even date herewith.” Finally, the note provides that, if the debtor defaults, the holder will have the right to demand and receive “the entire unpaid principal balance hereof with all accrued and unpaid interest thereon and all unpaid late fees.”

Adams testified that she did not draft the note and does not know who did. She believed 12 combination mortgages were attached to the note; she does not know when she signed them, but she thinks it was simultaneously with the note. Fafinski testified that he thinks the note was drafted by a BenePartum attorney; he also thinks, but is not sure, he reviewed the note before he signed it. Although Fafinski testified that the mortgages existed, he did not produce any evidence of them, causing the district court to “take an adverse inference against Fafinski.”

On April 23, 2004, Adams and Fafinski signed a letter agreement drafted by BenePartum. It stated that: (1) Adams was indebted to BenePartum for an amount in excess of \$61,205; (2) on April 14, 2004, she had executed a promissory note for \$61,205.45 and 12 mortgages, each for \$45,000, as security for the note;¹ (3) she could reduce the amount owed to \$45,000 by paying that amount by May 28, or to \$50,000 by paying that amount

¹ The promissory note and the mortgages totaled \$601,205.45 (12 x \$45,000 = \$540,000; \$540,000 + \$61,205.45 = \$601,205.45).

by June 28, or to \$55,000 by paying that amount by July 27; and (4) if she did not make any of these payments, she would owe the full \$61,205.45. Adams did not make any of the payments. Fafinski did not produce evidence of any mortgages executed with the note.

Although Fafinski claimed that the promissory note was enacted so Adams could continue to receive legal services from BenePartum, neither the note nor the letter agreement referred to continuing legal services, and the stated purpose of the letter was to “compromise and settle the amount of the indebtedness for legal services rendered to the Client [i.e., Adams] by Attorneys [i.e., BenePartum] through April 14, 2004.” Neither the letter nor the note refer to any legal services after that date.

On June 10, 2004, Adams granted BenePartum two mortgages (the June mortgages), one for each of the two parcels of land in which she had a vendee’s interest under the contract for deed with the Kleins. A BenePartum attorney drafted the mortgages, which were recorded as 31395 and 31396. The mortgages show that BenePartum paid a mortgage registration tax of \$103.50, the tax for a principal amount of \$45,000. Although Adams and Fafinski both speculated that the mortgages had not been recorded correctly, neither of them produced any evidence of incorrect recording, and neither of them testified to direct knowledge about the recording.

Each mortgage states that:

Mortgagor will pay to Mortgagee the principal sum of . . . \$45,000.00 according to the terms of that certain Promissory Note of even date herewith made by Mortgagor to the order of Mortgagee in the stated principal amount of . . . \$45,000.00, all of the terms of which are hereby made a part of this Mortgage to the same extent and with the same effect as if they were fully set forth herein, and shall also pay all other sums, with interest

thereon, as may be advanced by Mortgagee in accordance with the Mortgage to protect the lien of this Mortgage.

No evidence was produced of the June 10, 2004, promissory note referred to in the mortgage or of any promissory note for \$45,000.

Both Fafinski and Adams testified that the June mortgages were intended to secure the April 14, 2004, note, but the language of the note, of the letter agreement, and of the mortgages themselves contradicts this testimony. Adams also testified that three additional mortgages, two dated April 30, 2004, and one dated June 30, 2004, were likewise intended to secure the note, and that, on April 14, 2004, the date of the note, she also drafted six letters saying she would give mortgages on certain properties. Fafinski also testified that 12 simultaneously executed combination mortgages were executed with the note but were rejected for recording issues, so new mortgages had to be executed, but that he was not personally involved in this.

In September 2005, Adams, without the permission of BenePartum, transferred her vendee's interest in the properties by quitclaim deed to Rose Light Construction, LLC (RLC), an entity she owned. In 2009, the Kleins, holders of the vendor's interest, served notice of cancellation of the contract for deed on Adams, RP, and RLC, alleging defaults including the mortgages on the properties that Adams granted to BenePartum and giving Adams until November 1, 2009, to correct the defaults.

Adams received legal advice on avoiding the cancellation of the contract for deed from the Bonner & Borhart law firm, which began a lawsuit against the Kleins to enjoin

cancellation of the contract for deed. The complaint acknowledged that the two \$45,000 June mortgages were recorded against the properties.

John Bonner of that firm was the owner of respondent Melrose Community, LLC (Melrose). On October 29, 2009, Adams transferred all her vendee's interest in the properties, whether held in her name or by RP or RLC, to Melrose through an agreement between herself and Bonner. This agreement did not involve the note between Adams and BenePartum and did not transfer Adams's debt to BenePartum to Melrose. The agreement provided that Melrose would apply for financing, pay off the contract for deed, place a mortgage on the manufactured-home community, and convey back to Adams the vacant or non-income-producing property. Melrose received a commitment for mortgage financing of \$350,000 but could not close on it because of issues with legal descriptions of the properties.

In 2012, Melrose began a proceeding subsequent to title registration to correct the legal descriptions and enable it to close on financing. That proceeding resulted in two district court orders: a March 28, 2013, order indicating that the vendee's interest in the properties was assigned from Adams to RLC and subsequently to Melrose on October 29, 2009, and an August 12, 2013, final order that new certificates of title be issued to the properties, with exhibits showing the 2005 assignment to RL and the 2009 assignment to Melrose. Melrose executed a mortgage with respondent Profinium, Inc. and paid off the contract for deed; the Kleins executed a warranty deed for the properties.

Appellant, successor in interest to BenePartum, brought this action against Melrose, Profinium, and several other entities, seeking (1) a declaratory judgment that the June

mortgages on the properties granted to it by Adams are valid, enforceable, and superior to the interest of Melrose and of the other defendants in the properties, and (2) a demand for relief to foreclose the mortgages and sell the properties.

Melrose brought a third-party action against Adams for equitable contribution and indemnity. Adams's attorney filed a motion to dismiss under Minn. R. Civ. P. 12.02(e). The district court denied the motion; Adams did not serve a timely answer, and Melrose moved for a default judgment against her. In September 2017, the district court granted Melrose's motion, noting that, because Melrose's claims against Adams were derivative of appellant's foreclosure claims, Melrose would be allowed to establish the amount of its claims after appellant's claims had been determined.

Following a two-day trial on appellant's claims in December 2017, the district court issued findings of fact, conclusions of law, and order for judgment addressing appellant's argument that the June mortgages secured the note, thus providing consideration for the mortgages, and the defendants' argument that the June mortgages failed for lack of consideration because they said they secured a "Promissory Note of even date herewith," [i.e. June 10, 2004,] in the amount of \$45,000, and there was no such promissory note.

The district court concluded that appellant failed to prove it was entitled to a foreclosure of the property because the April 2004 note it had with Adams was not secured by any mortgages: the June mortgages did not have a payment schedule, they merely specified a "Note of even date herewith" which, like the 12 mortgages referenced in the April note, was never produced. The district court entered judgment for the defendants against appellant, who had failed to prove its entitlement to foreclosure on the properties,

and also concluded that, because Melrose had no liability to pass on to Adams, the court did not need to alter its September 2017 order.

Appellant filed a notice of appeal from the judgment; it also moved to amend the findings of fact, conclusions of law, order for judgment, and judgment, or in the alternative for a new trial. Following a hearing, the district court issued an order denying the motions, and appellant filed a notice of appeal from the order. This court consolidated the appeals.

Appellant argues that the district court's finding that the June mortgages were not supported by any consideration were clearly erroneous and that the district court abused its discretion in denying his motions.

D E C I S I O N

1. Lack of consideration for the June mortgages

"A consideration is essential to the validity of a mortgage," and whether a consideration exists is a question of fact. *Turpin v. Hayek*, 18 N.W.2d 592, 592 (Minn. 1945). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

[W]e review the district court's factual findings for clear error. That is, we examine the record to see if there is reasonable evidence in the record to support the court's findings. And when determining whether a finding of fact is clearly erroneous, we view the evidence in the light most favorable to the verdict. To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made.

Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790, 797 (Minn. 2013) (quotations and citations omitted). “In an ordinary civil action, the plaintiff has the burden of proving damages caused by the defendant by a fair preponderance of the evidence.” *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997). “The preponderance of the evidence standard requires that[,] to establish a fact, it must be more probable that the fact exists than that the contrary exists”; moreover, “[i]f evidence of a fact or issue is equally balanced, then that fact or issue has not been established by a preponderance of the evidence.” *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004).

The district court found that

While Adams and Fafinski testified that they now believe that these two [June 10] Mortgages were intended to secure the [April 14] Note, their testimony is also about events that occurred *more than ten years ago*, lacking in specifics as to what exactly occurred, and *contradicted* by the language of both the Note, the Mortgages, and the Letter Agreement that were contemporaneously drafted.

(Footnote omitted.)

The three documents support this finding. First, the Note, dated April 14, 2004, states that it was “secured by twelve (12) combination Mortgages, dated of even date herewith,” each of which was “a distinct and separate security instrument securing the repayment of this Note” and “of even date herewith.” No copy and no evidence of any of the 12 mortgages mentioned or of any other mortgage bearing the note’s April 14, 2004, date was ever produced.

Second, the letter agreement signed on April 23, 2004, by both Adams and Fafinski stated that, when Adams executed the note on April 14, she “simultaneously executed

twelve (12) mortgages on certain defined real property located in Minnesota, each in the amount of Forty-five Thousand Dollars (\$45,000), as security for said Promissory Note.” Neither evidence nor copies of the 12 \$45,000 mortgages were ever produced.

Third, the two June mortgages that were produced were dated June 10, 2004, and were thus not “of even date” with the April 14 note. Moreover, they stated that Adams, as mortgagor, was to pay to BenePartum, as mortgagee,

the principal sum of Forty-Five Thousand and 00/100 Dollars (\$45,000.00) according to the terms of that certain Promissory Note of even date herewith [i.e., June 10, 2004] made by Mortgagor to the order of Mortgagee in the stated principal amount of Forty-Five Thousand and 00/100 Dollars (\$45,000.00) (the ‘Note’), all of the terms of which are hereby made a part of this Mortgage to the same extent and with the same effect as if they were fully set forth herein.

No copy and no evidence of the note referred to in these mortgages was ever produced, nor could the reference have been to the April 14 note, which had a different date and did not specify \$45,000 or any other amount. Thus, the two June mortgages refer to a note that is not the April 14 note and the April 14 note refers to 12 mortgages that are not the two June mortgages. These facts support the district court’s statement that it “[did] not find that it has been proven by a preponderance of the evidence that the June 10, 2004 Mortgages were intended to secure the April 14, 2004 Note” and demonstrate that the finding is not clearly erroneous.

Nor does any other consideration support the June mortgages and, without consideration, they are not valid. *See Turpin*, 18 N.W.2d at 592. The district court did not err in finding that the June mortgages did not entitle Fafinski to foreclose.

2. Denial of appellant's alternative motions

A. Motion for Amended Findings

The denial of a motion for amended findings, conclusions of law, and order is reviewed for an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). A “motion for amended findings must be based on the record previously submitted to the district court, and the district court may neither go outside the record nor consider new evidence when addressing the motion.” *Cook v. Arimitsu*, 907 N.W.2d 233, 237 (Minn. App. 2018) (quotation omitted), *review denied* (Minn. Apr. 17, 2018). A party moving for amended findings has the burden “to show that there is no substantial evidence reasonably tending to sustain the [district] court’s findings,” and a refusal to amend cannot be reversed merely because “there was evidence to justify the proposed amended findings had they been made.” *Nielsen v. City of St. Paul*, 88 N.W.2d 853, 864 (Minn. 1958). “If there is conflicting evidence, a court is not compelled to amend.” *State ex rel. Fort Snelling State Park Ass’n v. Minneapolis Park and Recreation Bd.*, 673 N.W.2d 169, 178 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004).

Appellant sought 13 amendments to the district court’s findings of fact, conclusions of law, order for judgment, and judgment. The district court dealt with each of them in detail.² For suggested amendments 4, 5, and 10, appellant requested deletions without explaining why, and the district court declined to amend on that basis, citing *Nielsen* for

² The portion of the district court’s order denying the motion for amended findings runs more than 15 pages.

the proposition that a motion to amend must be supported by a showing that “there is no substantial evidence reasonably tending to sustain the [district] court’s findings.” *Nielsen*, 88 N.W.2d at 864. The district court also relied on this proposition in declining to make suggested amendments 3, 11, 12, and 13.³

Another proposition from *Nielsen*, i.e., the fact that “there was evidence to justify the proposed amended findings had they been made” is not enough to justify the reversal of a refusal to amend, *id.*, was the district court’s basis for not making amendments 1, 2, 6, 7, and 8. Finally, the district court quotes the proposition that “[i]f there is conflicting evidence, a court is not compelled to amend,” *Fort Snelling*, 673 N.W.2d at 178, to support its decision not to make suggested amendment 9 and to provide additional support for its decision not to make other amendments.

Appellant provides no refutation of the district’s court’s explanations of its refusal to make the suggested amendments. Instead, appellant argues that the district court should not have relied on the fact that Fafinski and Adams were testifying about events that had happened more than ten years earlier. This argument is based on the view that, because the statute of limitations for mortgages is 15 years, “the legislature has deemed, in the case of mortgages, evidence does not become stale and memories do not fade until after [15] years from the date of the subject mortgage has passed.” Appellant provides no support for its view that the statute of limitations, governing when actions may be brought, also governs the weight to be given to testimony.

³ Amendments 12 and 13 are misnumbered as 15 and 20 respectively in the district court’s opinion.

B. Motion for a New Trial

“We review a district court’s new trial decision under an abuse of discretion standard.” *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010).

Appellant moved in the alternative for a new trial on the ground that the district court erred when it relied on the fact that Fafinski and Adams testified about events more than ten years old, arguing that their testimony “meet[s] the preponderance of the evidence standard and should not be discredited due to the passage of time.”

“The applicable test for granting a new trial on the basis that the evidence does not justify the verdict is whether the verdict is so contrary to the preponderance of the evidence as to imply that the [factfinder] failed to consider all the evidence, or acted under some mistake” *Clifford v. Geritom Med. Inc.*, 681 N.W.2d 680, 687 (Minn. 2004) (quotation omitted).

The district court noted that it relied on factors other than the passage of time in concluding that the June mortgages were not supported by consideration, citing two passages from its order, the second of which is a footnote to the first.

While Adams and Fafinski testified that they now believe that these two Mortgages were intended to secure the Note, their testimony is also about events that occurred *more than ten years ago*, lacking in specifics as to what exactly occurred, and contradicted by the language of both the Note, the Mortgages, and the Letter Agreement that were contemporaneously drafted. . . .

Along with the passage of time, it is to be expected that some memories would be faded. However, Fafinski and Adams also did not have personal knowledge about what specifically occurred in 2004. For example, while both Fafinski and Adams speculated that the reason

for the differing dates on the Note and the Mortgages *may* have been due to a recording issue, neither testified that he or she was personally involved in recording the Mortgages.

Particularly in light of the conflicts between the documentary evidence and Adams's and Fafinski's testimony and the failure to produce either the 12 mortgages that were said to be attached to the April 14 note or the note "of even date herewith" referred to in the June mortgages, the district court did not abuse its discretion in denying a new trial on the ground that its verdict was not supported by the evidence.

The district court did not err in finding that the June mortgages were not valid because they had no consideration, and it did not abuse its discretion either in declining to amend its findings, conclusions, order for judgment, and judgment or in denying the motion for a new trial

Affirmed.