

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 6/4/2024 10:01 AM

2 **GUERA PROPERTIES, LLC,**



Ramon J. Maestas
Chief Clerk

3 Plaintiff-Appellant,

4 v.

No. A-1-CA-40919

5 **1776 PROPERTIES, LLC,**

6 Defendant-Appellee.

7 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8 **Victor S. Lopez, District Court Judge**

9 Ferrance Law, P.C.

10 David A. Ferrance

11 Albuquerque, NM

12 for Appellant

13 Marris Griebel Law, Ltd

14 Clinton W. Marris

15 Albuquerque, NM

16 for Appellee

17 **MEMORANDUM OPINION**

18 **BOGARDUS, Judge.**

19 {1} Guera Properties, LLC (Guera) appeals the district court's grant of summary

20 judgment in favor of 1776 Properties LLC (1776) arising from the parties'

21 competing petitions to redeem certain real property. Guera contends that the district

22 court erred by (1) determining that the assignment of the right of redemption to 1776

23 was valid, (2) applying the "first-in-time" rule to the competing petitions filed in the

1 case, and (3) resolving disputed questions of material fact in favor of 1776. Because
2 we conclude that the assignment of the right of redemption to 1776 was invalid, we
3 reverse the district court's order.

4 **BACKGROUND**

5 {2} In 2016, Dianah Rowland was appointed personal representative of the estate
6 of Lee Rowland, the owner of real property located at 6605 Cueva Escondida NW,
7 Albuquerque, New Mexico (the Property). Several months later, Ditech Financial
8 LLC (Ditech) brought an action to foreclose the mortgage on the Property. Rowland
9 executed a document titled, "Sale of Redemption Rights" (2017 Assignment),
10 purporting to assign the estate's redemption right to 1776. The document stated in
11 pertinent part:

12 For valuable consideration of \$2,500.00 payable 10 days after the
13 redemption of 6605 Cueva Escondida N.W. Abq, NM 87120 Dianah
14 Rowland, The Personal Representative of the Estate of Lee J.
15 Rowland[] transfers and assigns his/her rights of redemption on the
16 above described property pursuant to the terms of the mortgage to 1776
17 Properties, LLC.

18 Rowland was not paid at the time of the assignment, and has yet to be paid by 1776.
19 The foreclosure action was subsequently dismissed.

20 {3} In 2018, Ditech filed a new foreclosure action. The district court entered a
21 foreclosure decree in 2021. Before the Property was auctioned, Rowland executed
22 three documents: the first, attempting to rescind the 2017 Assignment to 1776; the

1 second, assigning the estate’s right of redemption to Guera (2021 Assignment); and
2 lastly, granting Guera all of Rowland’s rights, title, and interests in the Property.

3 {4} In 2021, Javier Pavia purchased the Property at the foreclosure sale subject to
4 a one month right of redemption. After the district court’s approval of the sale of the
5 Property, 1776 timely filed its petition for redemption and deposited redemption
6 funds into the court’s registry. Guera filed its own petition for redemption and
7 deposited the redemption funds into the court’s registry. Guera filed for summary
8 judgment, seeking confirmation of its redemption by claiming the 2017 Assignment
9 to 1776 was unenforceable. The district court denied Guera’s motion and found that
10 the 2017 Assignment to 1776 was valid, enforceable, and first in priority. Arguing
11 it was entitled to redeem the Property because it was the first party with a valid right
12 of redemption, 1776 filed its motion for summary judgment. The district court
13 granted 1776’s motion for summary judgment. Guera appeals.

14 **DISCUSSION**

15 {5} On appeal, Guera argues that the district court erred by determining that the
16 2017 Assignment to 1776 was valid. Specifically, Guerra contends that 1776’s
17 promise to pay Rowland \$2,500 upon successful redemption of the Property was
18 illusory and therefore the 2017 Assignment was invalid for lack of consideration. In
19 response, 1776 argues that Guera lacks standing to challenge the validity of the 2017
20 Assignment on consideration grounds and that its promise to pay Rowland after

1 successfully redeeming the Property is adequate consideration because it is lawful,
2 definite, and possible. We conclude that the district court erred in granting summary
3 judgment in favor of 1776 because the 2017 Assignment lacked consideration.

4 **STANDARD OF REVIEW**

5 {6} “Summary judgment is appropriate where there are no genuine issues of
6 material fact and the movant is entitled to judgment as a matter of law.” *Phoenix*
7 *Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶ 17, 390 P.3d 174
8 (internal quotation marks and citation omitted). We review these issues of law de
9 novo. *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 6, 336 P.3d 443. Because
10 the facts pertinent to the issue of whether the 2017 Assignment was supported by
11 consideration are undisputed, we turn to the legal arguments asserted by the parties.

12 **I. Guera Has Standing**

13 {7} The argument raised by 1776 on this issue is that Guera lacks standing to
14 challenge the validity of the Assignment on consideration grounds because Guera
15 was not a party to the assignment.¹ We disagree.

¹Guera asserts that 1776 waived its argument regarding standing by not raising it at the district court level. But 1776, as the appellee, had no duty to preserve its standing argument, thus the argument is not waived. *See Wild Horse Observers Ass’n, Inc. v. N.M. Livestock Bd.*, 2016-NMCA-001, ¶ 29, 363 P.3d 1222 (“An appellee is not required to preserve arguments to affirm so long as those arguments are not fact-based such that it would be unfair to the appellant to entertain those arguments.” (internal quotation marks and citation omitted)). We therefore address it here.

1 {8} “Standing” is “[a] party’s right to make a legal claim or seek judicial
2 enforcement of a duty or right,” *Standing, Black’s Law Dictionary* (11th ed. 2019),
3 and “the claimant must have a personal stake in the outcome of a case” to
4 demonstrate standing. *Doña Ana Cnty. Clerk v. Martinez*, 2005-NMSC-037, ¶ 13,
5 138 N.M. 575, 124 P.3d 210 (alterations, internal quotation marks, and citation
6 omitted). “[T]here is no significant difference between having standing to sue and
7 having a cause of action under [a statute].” *Gandydancer, LLC v. Rock House CGM,*
8 *LLC*, 2019-NMSC-021, ¶ 8, 453 P.3d 434. To have a statutory cause of action, “[a]
9 plaintiff must demonstrate that the interest sought to be protected by the complainant
10 is arguably within the zone of interests to be protected or regulated by the statute.”
11 *Id.* Guera filed its petition to redeem the Property, pursuant to NMSA 1978, Section
12 39-5-18 (2007) (the redemption statute). Thus, to determine if Guera had standing
13 to sue in this case we must determine whether Guera’s interest in redeeming the
14 Property is protected or regulated by the redemption statute.

15 {9} The redemption statute states that “[a]fter sale of real estate pursuant to the
16 order, judgment or decree of foreclosure in the district court, the real estate may be
17 redeemed by the former defendant owner of the real estate . . . whose rights were
18 judicially determined in the foreclosure proceeding.” Section 39-5-18(A). A former
19 defendant owner includes the owner’s personal representatives, heirs, successors,
20 and assigns. *BOKF, N.A. v. Unknown Heirs of Pacheco*, 2021-NMCA-010, ¶ 9, 484

1 P.3d 1020; *see* § 39-5-18(D). Thus, the assignee of a former defendant owner can
2 redeem a property “by filing a petition for redemption in the pending foreclosure
3 case in the district court in which the order, judgment or decree of foreclosure was
4 entered and by making a deposit . . . in cash in the office of the clerk of that district
5 court.” Section 39-5-18(A)(2); *see also Freedom Mortg. Corp. v. Stevens*, 2023-
6 NMCA-034, ¶ 10, 528 P.3d 745 (“Consistent with the express language of the
7 statute, New Mexico courts . . . have held that the right of redemption is an
8 assignable right” (internal quotation marks and citations omitted)). If more than one
9 petition to redeem is filed, the court will hold a hearing to “determine which
10 redemption has priority . . . and which party is therefore entitled to redeem the
11 property.” Section 39-5-18(C).

12 {10} As discussed above, both 1776 and Guera filed petitions for redemption and
13 deposited the required funds in the district court’s registry. Additionally, both 1776
14 and Guera asserted their right to redeem the Property based on the purported
15 assignment of the right of redemption from Rowland. As such, Guera is a former
16 defendant owner under the statute, and its interest in redeeming the Property is
17 regulated and protected by Section 39-5-18. *See* § 39-5-18(A), (D).

18 {11} To successfully enforce its interest, Guera had to prove it possessed a valid
19 right to redeem and that its right has priority over any other asserted redemption
20 right. *See* § 39-5-18(C). Thus, Guera had to prove the 2017 Assignment to 1776 was

1 invalid—if the 2017 Assignment was valid, Rowland would not have possessed a
2 redemption right to assign to Guera in 2021, and consequently Guera would possess
3 no right to redeem the Property. *See* 6A C.J.S. *Assignments* § 111 (2023) (“An
4 assignee stands in the shoes of the assignor and ordinarily obtains only the rights
5 possessed by the assignor at the time of the assignment, and no more.”). We conclude
6 that Guera had standing to challenge the validity of the 2017 Assignment to 1776
7 because doing so was a necessary part of asserting its own right of redemption.²

²In arguing that Guera lacks standing to challenge the 2017 Assignment, 1776 relies on a series of cases, which stand for the general rule that a debtor lacks standing to challenge the validity of an assignment bestowing the assignee a right to collect on that debt or obligation. *See, e.g., Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 18, 356 P.3d 1102 (holding that a debtor has no standing to challenge the validity of an assignment of a mortgage based on lack of consideration because it was not a party to the assignment). The rationale behind this rule is that a debtor is not injured by an invalid assignment of the right to collect their debt because their obligation remains the same no matter who may collect, *see Barker v. Danner*, 903 S.W.2d 950, 955; *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 735 (E.D. Mich. 2010) (“[T]he validity of the assignments does not [a]ffect whether Borrower owes its obligations, but only to whom Borrower is obligated.”). But 1776 fails to point us to authority applying this rule to competing petitions to redeem property. Thus, we assume none exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that where a party cites no authority to support an argument we assume none exists). Moreover, the cases relied on are inapposite to the circumstances here. In order to enforce its right to redeem a party must establish the validity and priority of its own right, which necessarily requires challenging either the validity or priority of a competing party’s right. *See* § 39-5-18(C).

1 **II. The 2017 Assignment to 1776 is Invalid for Lack of Consideration**

2 {12} Next, Guera argues that the 2017 Assignment was invalid because 1776’s
3 promise to pay Rowland for the assignment of the right of redemption upon
4 successful redemption of the Property was illusory and therefore lacked
5 consideration. We agree.

6 {13} As stated above, the statutory right of redemption is assignable. *See Freedom*
7 *Mortg. Corp. v. Stevens*, 2023-NMCA-034, ¶ 10, 528 P.3d 745. “An assignment is
8 a contractual transfer of a right, interest, or claim from one person to another.” 6A
9 C.J.S. *Assignments* § 1 (2024); 6 Am. Jur. 2d *Assignments* § 1 (2024) (“An
10 assignment is a contract between the assignor and the assignee, . . . and is interpreted
11 or construed according to the rules of contract construction.”). Because assignments
12 are generally treated like contracts, *see* 6A C.J.S. *Assignments* § 56 (2024) (stating
13 that “[a]ssignments are generally subject to the same requisites for validity as other
14 contracts”), they require adequate consideration to be enforceable. *See White Sands*
15 *Constr., Inc. v. City of Las Cruces*, 2023-NMCA-056, ¶ 9, 534 P.3d 1015 (“The
16 essential attributes of a contract include an offer, an acceptance, consideration, and
17 mutual assent.”); 6A C.J.S. *Assignments* § 62 (“An assignment must be supported
18 by legal and sufficient consideration, and any benefit accruing to the assignor or
19 forbearance or detriment given or suffered by the assignee will be a sufficient
20 consideration to support the assignment.”).

1 {14} “Consideration consists of a promise to do something that a party is under no
2 legal obligation to do or to forbear from doing something [it] has a legal right to do.”
3 *Talbott v. Roswell Hosp. Corp.*, 2005-NMCA-109, ¶ 16, 138 N.M. 189, 118 P.3d
4 194. “Words of promise which by their terms make performance entirely optional
5 with the promisor do not constitute a promise,” Restatement (Second) of Contracts
6 § 77 cmt. a (1981), and therefore fail to constitute adequate consideration. *See*
7 *Talbott*, 2005-NMCA-109 ¶ 16 (stating “a promise must be binding . . . [w]hen a
8 promise puts no constraints on what a party may do in the future—in other words,
9 when a promise, in reality, promises nothing—it is illusory, and it is not
10 consideration”).

11 {15} We begin by determining whether the promise 1776 made to Rowland in
12 exchange for the right of redemption was illusory. In doing so, we must interpret the
13 language of the 2017 Assignment. “We review questions of contract interpretation
14 de novo.” *White Sands Constr., Inc.*, 2023-NMCA-056, ¶ 8. We look first to see if
15 the language used by the parties is ambiguous. *See C.R. Anthony Co. v. Loretto Mall*
16 *Partners*, 1991-NMSC-070, ¶ 12, 112 N.M. 504, 817 P.2d 238 (“The process [of
17 contract interpretation] often turns upon whether the court determines that the
18 contract is ambiguous.”); *ConocoPhillips Co. v. Lyons*, 2013-NMSC-009, ¶ 23, 299
19 P.3d 844 (“The purpose, meaning and intent of the parties to a contract is to be
20 deduced from the language employed by them; and where such language is not

1 ambiguous, it is conclusive.”). “A contract term may be ambiguous if it is reasonably
2 and fairly susceptible to different constructions.” *Id.* (alterations, internal quotation
3 marks, and citation omitted). If the language is unambiguous we give the words of
4 the contract their ordinary and usual meaning. *See Sipp v. Buffalo Thunder, Inc.*,
5 2024-NMSC-005, ¶ 15, 546 P.3d 1266 (“If a court concludes that there is no
6 ambiguity, the words of the contract are to be given their ordinary and usual
7 meaning.”).

8 {16} Here, 1776 claims that it obtained the right of redemption for the Property for
9 valuable consideration. We disagree. The pertinent portion of the contract states:

10 For valuable consideration of \$2,500.00 *payable 10 days after the*
11 *redemption of the [the property]* . . . Dianah Rowland [the PR of the
12 estate] . . . transfers and assigns his/her rights of redemption on the
13 above described property.

14 The phrase “payable 10 days after the redemption of the property” is unambiguous.
15 The only reasonable interpretation of this phrase is that Rowland will be paid for the
16 redemption right *after* the property is redeemed. *See ConocoPhillips Co.*, 2013-
17 NMSC-009, ¶ 23 (stating that “a contract term may be ambiguous [only] if it is
18 reasonably and fairly susceptible to different constructions”). By the plain language
19 of the 2017 Assignment, if 1776 did not redeem the property, it was not required to
20 pay Rowland. In other words, Rowland’s assignment of the redemption right was
21 done in exchange for 1776’s promise to pay *only if* it chose to redeem the Property
22 and nothing in the contract required 1776 to redeem. Because 1776 had no obligation

1 to redeem, its obligation to pay Rowland under the 2017 Assignment was a matter
2 of discretion. Therefore, its promise to pay Rowland was illusory and the 2017
3 Assignment was invalid for lack of consideration. *See Talbott*, 2005-NMCA-109,
4 ¶ 16 (“When a promise puts no constraints on what a party may do in the future—in
5 other words, when a promise, in reality, promises nothing—it is illusory, and it is
6 not consideration.”). Because the 2017 Assignment is invalid, 1776 has no right to
7 redeem the Property. *See id.* (“A valid contract must possess mutuality of obligation.
8 Mutuality means both sides must provide consideration.” (internal quotation marks
9 and citation omitted)). Therefore, we conclude that the district court erred in granting
10 summary judgment in favor of 1776.

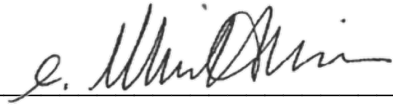
11 **CONCLUSION**

12 {17} For the foregoing reasons, we reverse. Because we reverse based on the
13 invalidity of the 2017 Assignment, we need not address Guera’s remaining
14 arguments on appeal.

15 {18} **IT IS SO ORDERED.**

16 
17 KRISTINA BOGARDUS, Judge

1 **WE CONCUR:**

2 

3 **J. MILES HANISEE, Judge**

4 

5 **JACQUELINE R. MEDINA, Judge**