STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0510

Walhof & Co., Mergers and Acquisitions, LLC, et al.,
Appellants,

vs.

MCB Holdings I, LLC, a successor in interest to MidCountry Bank; et al.,
Respondents.

Filed November 27, 2017
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-16-2774

Jeffrey Storms, Newmark Storms Law Office, LLC, Minneapolis, Minnesota; and

Dan Rasmus, Hovland & Rasmus, PLLC, Edina, Minnesota (for appellants)

Justin P. Weinberg, Daniel N. Moak, Michael M. Sawers, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

CONNOLLY, Judge

Appellants challenge the district court's dismissal under Minn. R. Civ. P. 12.03 of appellants' claims for breach of fiduciary duty, violation of the Uniform Commercial Code (UCC), breach of contract, and tortious interference with a contractual relationship. Appellants argue that the grant of judgment on the pleadings was improper because (1) the UCC statutorily and contractually applies to the sale of corporate-membership units, (2) respondents owed appellants a fiduciary duty, and (3) the indemnity clause present in the cash-management agreement between the parties does not bar the tortious interference claim. We affirm.

FACTS

Appellants are: (1) Walhof & Co., Mergers and Acquisitions, LLC (Walhof M&A) and (2) the two members of Walhof M&A, Christiaan Walhof and Bettina Walhof (collectively, the Walhofs). Respondents consist of: (1) MidCountry Bank (the bank); (2) MCB Holdings I, LLC (MCB); and (3) Lighthouse Management Group, LLC (Lighthouse).

According to the first amended complaint, two of the Walhofs' businesses and the Walhofs (collectively, the borrowers) entered into loan agreements, totaling $2.75 million, with the bank to fund the purchase of properties. As security for the loans, in addition to mortgages on the properties and personal guarantees, Bettina Walhof and Walhof M&A pledged their membership units of K&K Express Inc (K&K). The borrowers defaulted on these loans, and the bank sought to enforce its rights in Florida and Minnesota. Rather than

continue the litigation, the parties entered into a forbearance agreement, and the borrowers executed a confession of judgment and a stipulation for order of replevin of personal property.

Under the forbearance agreement, the bank agreed to refrain from exercising its rights and remedies under the loan documents and from pursuing the lawsuits in Florida and in Minnesota. The borrowers agreed to a payment schedule, whereby the loans would be fully paid by July 1, 2015. The collateral pledged for the three loans was to continue to serve as security until the debt was paid in full. The borrowers defaulted under the forbearance agreement. The loans remain in default. The bank filed the confession of judgment in Hennepin County, and a $2,679,975.28 judgment was entered against the borrowers, Walhof M&A, and the Walhofs.

Rather than file a replevin stipulation to exercise its right to seize the collateral, the bank entered into a cash-management agreement (the CMA) with the Walhofs, Walhof M&A, and K&K. To effectuate the bank's rights over the K&K membership units, the bank retained Timothy Becker of Lighthouse. The CMA established Becker's powers over the K&K membership units, which included the power "to dispose of the membership units of K&K in accordance with the Minnesota Uniform Commercial Code for the benefit of [the bank]."

The bank sold the K&K membership units in a private sale and assigned the CMA to a company for $1.5 million. The judgment against the borrowers was not satisfied by this sale. Appellants filed a seven-count amended complaint against respondents, for: (1) a commercially unreasonable sale under Minn. Stat. § 336.9-610(b) (2016) against all

respondents; (2) breach of contract against the bank; (3) breach of fiduciary duty against all respondents; (4) breach of the covenant of good faith and fair dealing and bad faith conduct against the bank; (5) economic duress against all respondents; (6) tortious interference with contract and business relationships against all respondents; and (7) seeking a declaratory judgment.

Respondents sought judgment on the pleadings on the grounds that (1) Article 9 of the UCC, codified in Minn. Stat. § 336.9 (2016), did not apply to the bank's sale of the K&K membership units and (2) all claims appellants raised in their complaint were barred by the CMA's indemnity provision. The district court granted respondents' motion for judgment on the pleadings as a matter of law and dismissed all of appellants' claims. Appellants moved to supplement the record with two emails discussing the CMA and the intention behind it. The district court denied appellants' motion, holding that the CMA is an unambiguous document; thus, the parol evidence rule excludes contradictory evidence outside its four corners. Appellants now challenge three aspects of the district court's ruling.

D E C I S I O N

I.

Appellants assert that the district court erred in dismissing their claim for breach of fiduciary duty because whether a de facto fiduciary relationship exists is a fact question, which should survive a motion for judgment on the pleadings. Judgment on the pleadings should not be granted unless the pleadings show that the nonmoving party "has no claim to present to the [district] court by evidence." *Ryan v. Lodermeier*, 387 N.W.2d 652, 653

(Minn. App. 1986). "Only if the pleadings create no fact issues should a motion for judgment on the pleadings be granted." *Id.* Thus, the district court is not precluded from resolving the issue by judgment on the pleadings if, as a matter of law, no fiduciary duty exists.

We conclude that even if we take the facts that appellants alleged in the pleadings and the incorporated references as true, they do not support that a fiduciary relationship existed. We agree with the district court that the CMA effectuated an outright assignment of the K&K membership units. Any relationship between the bank and appellants prior to the CMA was a simple lender-borrower relationship. A lender-borrower relationship does not create a de facto fiduciary relationship absent special circumstances. *See Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). Minnesota has recognized that such special circumstances might arise when a lender knows or should know that the borrower is trusting the lender to counsel and inform them. *Id.* at 422, 196 N.W.2d at 623. No such circumstances exist here. When entering the CMA, appellants were represented by independent counsel. Additionally, the bank was enforcing its rights against appellants in court, so the parties were clearly adverse to one another in the midst of litigation. There was no reason that the bank should have known that appellants were relying on the bank to counsel and inform them.

In arguing that Lighthouse, as Becker's employer, owed appellants a fiduciary duty, appellants assert that Becker was acting as a receiver for K&K. To support this assertion, appellants rely on two emails that appellants asked the district court to consider by supplementing the record. The district court properly denied this motion to supplement.

The first email concerned information that was already alleged in appellant's first amended complaint. In a judgment-on-the-pleadings analysis, the district court accepts the complaint's allegations as true. *See, e.g., Walsh v. U.S. Bank*, 851 N.W.2d 598, 606 (Minn. 2014). Thus, the district court had already considered the substance of the email in the complaint. The second email contradicted the plain language in the CMA, which is a fully integrated, unambiguous, written document. The parol evidence rule prohibits evidence outside a written document which varies or contradicts the plain language of the document. *Hield v. Thyberg*, 347 N.W.2d 503, 507 (Minn. 1984). Thus, the district court properly excluded the second email from its consideration. No court gave Becker or Lighthouse the authority to act as a receiver, and neither Becker nor Lighthouse were signatories to the CMA. Thus, appellants have not alleged any facts to establish that Lighthouse was in a position to owe appellants a fiduciary duty. The district court did not err by granting respondents' motion for judgment on the pleadings on appellants' breach-of-fiduciary-duty claim.

II.

Appellants also argue that the grant of judgment on the pleadings was improper with respect to their breach-of-contract and UCC claims because whether the sale of K&K membership units was commercially reasonable is a fact issue. We disagree.

For the UCC's commercially reasonable sale requirement codified in Minn. Stat. § 336.9-610(b) to apply, the K&K membership units had to have been collateral at the time of the sale. Article 9 applies to all transactions that contractually create a security interest in personal property or fixtures. Minn. Stat. § 336.9-109(a)(1). When the security interest

is created in personal property, the property is referred to as "collateral." Minn. Stat. § 336.9-102(a)(12). However, the K&K membership units were not collateral after the parties entered into the CMA because the agreement assigned all of appellants' ownership interests in the units.

"Under Minnesota law no particular form of words is required for an assignment, but the assignor must manifest an intent to transfer and must not retain any control or any power of revocation." *Minn. Mut. Life Ins. Co. v. Anderson*, 504 N.W.2d 284, 286 (Minn. App. 1993). Paragraph 1 of the CMA states, "Bettina Walhof and Walhof M&A, by their execution of this Agreement, hereby transfer all rights, title and interest in the membership units of K&K to [the bank]." This unambiguous language demonstrates an outright assignment of the K&K membership units.

Appellants claim that they retained an equitable right of redemption because of a later CMA provision that states:

> [s]o long as [the bank] is still the holder of the K&K membership units as provided hereunder, [the bank] shall transfer the right, title and interest of the K&K membership units back to Walhof M&A and Bettina Walhof upon the Indebtedness (as defined in the Forbearance Agreement) being paid in full.

However, appellants' ability to have the K&K membership units transferred back to them was contingent upon appellants paying back their indebtedness before respondents decided to sell the units. This never occurred. "When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs." *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. App.

1989). Since the CMA was an outright transfer of the K&K membership units from appellants to respondents, no security interest exists, and Minn. Stat. § 336.9-610(b) does not apply.

The CMA also does not contractually require the bank to abide by the UCC when selling the K&K membership units. In arguing that such a requirement binds the bank, appellants cite the CMA provision outlining Becker's powers regarding the membership units, including his power "to dispose of the membership units of K&K in accordance with the Minnesota [UCC] *for the benefit of [the bank]*." (Emphasis added). This phrase governs conduct between Becker and the bank, not between respondents and appellants. If Becker were to sell the units, the bank, as the owner of the units, required him do so in accordance with the UCC for its benefit and not the benefit of appellant. This requirement does not apply to the facts at hand. Appellants' UCC and breach-of-contract claims fail as a matter of law; thus, judgment on the pleadings on those claims was properly granted to respondents.

III.

Appellants also challenge the district court's conclusion that the CMA indemnity provision barred all appellants' claims against respondents. As explained above, the district court properly granted judgment on the pleadings on six of the seven claims because they failed as a matter of law on other grounds. Thus, appellants' tortious interference with a contract claim would be the sole claim resurrected if the indemnity provision did not operate to bar it. Because the indemnity clause unambiguously bars "all claims," we affirm.

Appellants argue that Minnesota caselaw requires indemnity provisions to be narrowly construed to explicitly state that they apply to first-party claims. However, the cases upon which appellants rely relate to construction or negligence claims. *See, e.g.*, *Nat'l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690 (Minn. 1995); *Johnson v. McGough Constr. Co., Inc.*, 294 N.W.2d 286 (Minn. 1989); *Bogatzki v. Hoffman*, 430 N.W.2d 841 (Minn. App. 1988); *Oster v. Medtronic, Inc.*, 428 N.W.2d 116 (Minn. App. 1988), *review denied* (Minn. Dec. 21, 1988). In other contexts, indemnity provisions are interpreted according to general contract principles. *See, e.g.*, *Buchwald v. Univ. of Minn.*, 573 N.W.2d 723, 726 (Minn. App. 1998) (interpreting nonconstruction indemnity contract by applying the general principles of contract construction).

"[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). If a contract is unambiguous, then "there is no room for construction." *City of Virginia v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Here, appellants agreed to indemnify and hold respondents harmless "from and against any and all claims. . . . which are related to or arise in any manner out of [the CMA]." This language clearly and unambiguously applies to all claims that arise under the CMA. Appellants' tortious interference with a contract claim arose out of the CMA because the bank's sale of the K&K membership units and Becker's management of K&K

are the bases for the claim. Thus, the district court did not err in granting judgment on the pleadings for this claim.

Affirmed.