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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1200**

Gary White,
Plaintiff,

Jeffrey White, et al.,
Appellants,

vs.

Premier Bank, et al.,
Respondents,

Mark Smith,
Defendant.

**Filed May 28, 2019
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CV-17-40

Andrew J. Crowder, Juvian J. Hernandez, Robins Kaplan LLP, Minneapolis, Minnesota
(for appellants)

Edward W. Gale, Jr., Paul M. Shapiro, Thomas C. Atmore, Leonard, O'Brien, Spencer,
Gale & Sayre, Ltd., Minneapolis, Minnesota (for respondent Premier Bank)

Christopher L. Olson, Geck Duea & Olson, PLLC, White Bear Lake, Minnesota (for
respondent TCM Certified Development Company)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Slieter, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellants challenge the district court's grant of summary judgment, arguing that genuine issues of material fact precluded the district court from dismissing appellants' breach of contract, unjust enrichment, and negligent misrepresentation claims. Because there are no genuine issues of material fact and because respondent is entitled to judgment as a matter of law, we affirm.

FACTS

In 2005, Max Sterling Properties, LLC (Max Sterling) obtained loans from respondent Premier Bank (Premier) and Twin Cities-Metro Certified Development Company (TCM). The loans were taken to fund the purchase of commercial property and improvements, which included a retail gas station and office space. Premier agreed to lease the office space from Max Sterling at the location.

In late 2008, Max Sterling was in default on the loans for failure to make loan payments and pay property taxes. In June 2009, Mark Smith, a TCM employee, approached appellant Jeffrey White and Gary White—who were highly experienced in commercial real estate—to inquire about their interest in acquiring the property and assuming the loans from Max Sterling.¹ Both Whites knew that Smith was a TCM employee, the property was distressed, and the timeline to purchase the property and assume the loans was short.

¹ Gary White is not an appellant in this matter and TCM was voluntarily dismissed as a respondent prior to oral arguments.

In 2009, the Whites, through appellant Sales Dogs, LLC—formed to acquire the property and assume the loans—agreed to purchase the property and assume the loans from Max Sterling. Prior to any agreement on purchasing the real estate, appellants conducted little to no due diligence, relying on representations from Mark Smith.

In conjunction with assuming the Premier loan, Sales Dogs executed a promissory note in favor of Premier for \$926,000, which represented the original principal amount. Jeffrey White and Gary White each personally guaranteed the promissory note. Sales Dogs also assumed a loan issued by TCM which totaled \$667,000. The outstanding balance was \$616,199.28. Jeffrey White and Gary White personally guaranteed that loan as well.

Sometime before Sales Dogs purchased the property, TCM became aware that there was at least one defect on the property's title. There was apparently a 2005 recorded mortgage encumbering a small part of the property, which was not reflected in the title work that TCM had ordered. After Sales Dogs purchased the property, without informing appellants, TCM attempted to remedy the title defect by approaching the mortgage holder and offering to purchase it. Neither TCM nor Premier notified appellants of the mortgage.

In 2014, Sales Dogs defaulted on its loans from Premier and TCM. Premier subsequently foreclosed its first mortgage through court action. The foreclosure action sought a judgment on Premier's note, a foreclosure of the mortgage, and a deficiency judgment against Jeffrey White and Gary White, pursuant to their guarantees. Premier succeeded in the action.

After the foreclosure litigation, appellants learned about the undisclosed 2005 mortgage. Appellants and Gary White sued Premier alleging breach of contract, unjust

enrichment, negligence, negligent misrepresentation, and requesting a declaratory judgment that the loan obligations of Sales Dogs and the personal guarantees given by Gary White and Jeffrey White are void and unenforceable. Premier filed a summary judgment motion requesting the district court dismiss the complaint on the grounds of res judicata, arguing that the claims should have been brought during the first suit concerning the property and loan transactions. The district court granted Premier's summary judgment motion, dismissing appellants' claims both on the merits and pursuant to the doctrine of res judicata. Appellants filed a notice of appeal and argue that the district court erred when it dismissed their negligent misrepresentation, breach of contract, and unjust enrichment claims on the merits. They also argue res judicata is not applicable under the facts of this case.

D E C I S I O N

Summary judgment should be granted “when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law.” *Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011). A genuine issue of material fact exists when a fact may reasonably be resolved in favor of either party, but “the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-70 (Minn. 1997) (quotation omitted). The moving party has the burden to show that there is no issue of material fact, and this court must view the evidence in the light most favorable to the nonmoving party. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998). This court reviews de novo the district court's grant of summary judgment. *Melrose Gates, LLC v. Moua*, 875 N.W.2d 814, 819 (Minn. 2016).

Negligent Misrepresentation

Appellants argue that the district court erred when it granted summary judgment on their negligent misrepresentation claim because it erroneously concluded that Premier did not owe appellants a duty of care. To prevail on a negligent misrepresentation claim, a plaintiff must establish: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant supplied false information; (3) the plaintiff justifiably relied on the false information provided by the defendant; and (4) the defendant failed to exercise reasonable care in communicating the information to the plaintiff. *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012).

Appellants claim that Premier failed to disclose the recorded mortgage. Even assuming there is some evidence from which a jury could infer that Premier knew about the recorded mortgage prior to the transaction with appellants, Premier did not have a duty to disclose that fact to appellants. The Minnesota Supreme Court has held that “[a]s a general rule, one party to a transaction has no duty to disclose material facts to the other.” *Klein v. First Edina Nat’l. Bank*, 196 N.W.2d 619, 622 (Minn. 1972). Still, a duty to disclose may arise in special circumstances. *Id.* In *Klein*, the supreme court outlined three nonexhaustive circumstances that may create a duty to disclose: (1) “One who speaks must say enough to prevent his words from misleading the other party”; (2) “One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party”; and (3) “One who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.” *Id.*

Appellants rely on the second *Klein* example to support their argument that Premier had a duty to disclose the recorded mortgage. However, Premier argues that in a real estate transaction, the purchaser/borrower—not the bank—is obligated to conduct due diligence and take other actions to ensure all the facts surrounding the transaction are known; that a bank only has a duty to disclose information that would otherwise be unavailable to the borrower; and that a recorded mortgage is not the type of “special knowledge” contemplated by *Klein*. We agree.

In *Boubelik v. Liberty State Bank*, the Minnesota Supreme Court stated that parties seeking to borrow money from a bank “cannot avoid the responsibility of exercising reasonable diligence for their own protection by relying on their bank to provide them with information which . . . was otherwise readily available” because “[t]o adopt such a standard would put an intolerable obligation upon banking institutions and convert ordinary day-to-day business transactions into fiduciary relationships where none were intended.” 553 N.W.2d 393, 401-02 (Minn. 1996) (quotation omitted). Therefore, in *Boubelik*, the supreme court held that there was no duty to disclose when “the information plaintiffs claim was not disclosed to them was readily available to them . . . from the publicly recorded UCC filings.” *Id.* at 400.

Like a recorded UCC filing, a recorded mortgage is publicly available and discoverable to a borrower. Further, appellants conceded at the summary judgment hearing that the recorded mortgage could have been discovered prior to entering into the assumption agreement. Consequently, there was no duty to disclose. The district court did not err by dismissing appellants’ negligent misrepresentation claim.

Breach of Contract

Appellants next contend that the district court erred by dismissing their breach of contract claim on summary judgment. To prevail on a breach-of-contract claim, the plaintiff must show (1) the formation of a contract; (2) the plaintiff's performance of conditions precedent to its right to demand performance from the defendant; and (3) the defendant's breach of the contract. *Lyon Fin. Servs., Inc. v. Illinois Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014).

Appellants claim that Premier breached the assumption agreement by consenting to allow appellants to take title to the property from Max Sterling that was encumbered by a prior mortgage—i.e. that Premier breached by consenting to convey more than it could consent to—and “breached by failing to deliver the entire parcel free of the unknown encumbrance.” But appellants’ argument mischaracterizes the transaction that took place. First, Premier cannot be held liable for “failing to deliver the entire parcel,” because Premier at no point had any title to deliver. Indeed, Sales Dogs acquired title from Max Sterling, not Premier. Second, Premier did not breach its promise to consent to the conveyance of the property because Premier did consent to allow Max Sterling to convey the property to Sales Dogs. In doing so, Premier made zero representations about the character or nature of the property. Appellants’ attempt to mischaracterize the transaction that took place is unpersuasive. Consequently, the district court did not err by dismissing the breach of contract claim as a matter of law.

Unjust Enrichment

Lastly, appellants argue that they are entitled to equitable relief because Premier's conduct related to the title defects led to its unjust enrichment. Appellants' unjust-enrichment claim fails because the dispute between appellants and Premier involves appellants' assumption of Max Sterling's loan, which was done through the assumption agreement. Minnesota courts do not grant equitable relief "where the rights of the parties are governed by a valid contract." *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 268 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996). Additionally, appellants' argument that "there was an issue of fact regarding the character of the [p]roperty the [a]ppellants thought they were bargaining for" fails because Premier made no representations about the character of the property.²

Affirmed.

² Because we affirm the district court's grant of summary judgment on the merits, we decline to address the issue of res judicata.