STATE OF MINNESOTA
IN COURT OF APPEALS
A10-857
A10-1583

Robert A. Johnson, et al.,
Appellants,

vs.

U. S. Federal Credit Union,
Respondent.

Filed June 20, 2011
Affirmed in part, reversed in part, and remanded
Randall, Judge[*]

Hennepin County District Court
File No. 19HA-CV-09-5722

Scott A. Wilson, Shorewood, Minnesota (for appellants)

T. Chris Stewart, Garth G. Gavenda, Anastasi & Associates, P.A., Stillwater, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Stoneburner, Judge; and Randall, Judge.

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

RANDALL, Judge

In these consolidated appeals, appellants Robert Johnson (Johnson) and his wife, Deborah Johnson, and borrower Parkside Urban Homes (Parkside) (collectively

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

appellants), challenge a partial summary judgment and a final judgment entered against them on their breach-of-contract and equitable claims against the lender, respondent United States Federal Credit Union (USFCU), and in favor of USFCU on certain counterclaims. We affirm, except we hold that Deborah Johnson is not personally liable for the deficiency judgment, costs, or attorney fees, and Parkside is not liable for the deficiency judgment, due to USFCU's releases of their liability. We also modify the amount of attorney fees for which Parkside is liable.

FACTS

Robert Johnson formed Parkside in 2004 to develop a residential-condominium project. He is Parkside's president and CEO. Parkside entered into two loans with USFCU to finance the development project. First, on March 5, 2004, USFCU loaned Parkside $12,363,000, secured by promissory notes, a credit agreement, a mortgage on the Parkside development property, and personal guaranties by Robert Johnson and Deborah Johnson. Second, on March 28, 2006, USFCU loaned Parkside an additional $1 million, secured by five promissory notes, five assignments of rent, and mortgages on five individual condominium units owned by Parkside.

Parkside defaulted on the loans and, upon Parkside's request, on February 7, 2007, USFCU and appellants entered into a forbearance agreement. Although appellants complied with the agreement in part, they had further defaults under the forbearance agreement. They again asked USFCU to forbear from enforcing its rights, and on September 20, 2007, the parties entered into a first amendment to the forbearance agreement. In relevant part, Johnson pledged his membership units in Bowline

Properties, LLC (Bowline membership units), to provide additional security on his personal guaranty, and USFCU agreed to release Deborah Johnson from her personal guaranty.

Appellants defaulted yet again under the forbearance agreement and its first amendment, and in November 2008, after a meeting between the parties, USFCU advised them as to its planned liquidation of the collateral securing the loans. USFCU asserted that they then failed to cooperate. Accordingly, USFCU exercised its rights under the first amendment and foreclosed on the Bowline membership units in February 2009 and sold them in September 2009.

Parkside and Johnson again asked USFCU to forbear, and in August 2009, they entered into a second amendment to the forbearance agreement. In relevant part, USFCU agreed to release Johnson from certain obligations, explicitly conditioned on USFCU's receipt of a $300,000 reduction payment within 45 days of USFCU's delivery by electronic mail of the second amendment. Delivery of the second amendment, as defined therein, occurred on August 5, 2009, making the reduction payment due on or before September 19, 2009. After execution of the second amendment, then-counsel for Parkside and Johnson and counsel for USFCU negotiated the terms of the releases as contemplated in the second amendment.

Parkside and Johnson then terminated the representation by their then-counsel, engaged new counsel (the Johnsons' son-in-law), and refused to accept the previously negotiated releases. Johnson did not tender the $300,000 reduction payment on or before

September 19, 2009. On September 23, 2009, appellants brought the present action against USFCU for breach of contract, conversion, and replevin.

On October 2, 2009, Johnson tendered the reduction payment, which USFCU refused to accept in light of appellants' lawsuit against USFCU. In November 2009, the district court ordered Johnson to deposit the $300,000 reduction payment with the court, and he did so.

USFCU moved for summary judgment. On March 24, 2010, the district court ordered partial summary judgment in favor of USFCU, finding no just reason for delay and ordering that partial judgment be entered immediately. It ruled in favor of USFCU on various issues concerning USFCU's foreclosure on and possession and disposal of Johnson's Bowline units. It also ruled that Johnson breached the condition precedent in the second agreement by failing to timely tender the $300,000 reduction payment and that USFCU did not hinder him in his attempts to pay it. It dismissed appellants' claims, and awarded attorney fees and costs against Parkside, Robert Johnson, and Deborah Johnson. The court denied appellants' request for leave to file a motion for reconsideration on April 9, 2010. On May 11, 2010, appellants filed an appeal (A10-857) from the partial summary judgment.

Meanwhile, on March 30, 2010, the district court granted appellants' motion to amend their complaint, in relevant part, to add claims for replevin and breach of the implied covenant of good faith and fair dealing, but denied their motion to add a claim for conversion.

USFCU made a second motion for summary judgment. On August 31, 2010, the district court (1) granted USFCU's motion for summary judgment; (2) dismissed appellants' claims for breach of the implied covenant of good faith and fair dealing and for replevin; and (3) granted a deficiency money judgment to USFCU of $3,689,213.29 plus $43,297.18 in costs and attorney fees. (4) The court also denied appellants' motion for a stay pending appeal A10-857; and (5) ruled that the $300,000 reduction fee would continue to be held pending decision by this court on appeal A10-857. Judgment was entered and, on September 10, appellants filed an appeal (A10-1583) from the final judgment. This court granted appellants' motion to consolidate the two appeals.

D E C I S I O N

I.

Breach of contract and hindrance

We first address appellants' challenges that they raised in their appeal from the district court's partial summary judgment in favor of USFCU on its breach-of-contract claim, and against appellants on their breach-of-contract claim, under the terms of the second amendment to the forbearance agreement and the forbearance agreement.

The district court granted USFCU partial summary judgment on its breach-of-contract claim, ruling that appellants breached the condition precedent of making a timely reduction payment and that appellants failed to present genuine issues of material fact showing that USFCU hindered appellants from making the reduction payment in a timely manner.

USFCU's release of Johnson from his guaranties was explicitly conditioned on Johnson's timely tender of the reduction payment to USFCU. "A condition precedent . . . is one which is to be performed before the agreement of the parties becomes operative." *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. App. 1989) (quotations omitted). "When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs." *Id.* "If the event required by the condition does not occur, there can be no breach of contract, since the contract is unenforceable." *Id.* (quotation omitted).

However, "[u]nder Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance of the contract. Similarly, . . . the party to a contract cannot take advantage of the failure of a condition precedent when the party itself has frustrated performance of that condition." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (quotation and citations omitted). When such hindrance occurs, preventing the happening of a condition precedent, "the performance of the condition is excused and the liability of the promisor is fixed regardless of the failure to perform the condition." *Nodland v. Chirpich*, 307 Minn. 360, 367, 240 N.W.2d 513, 516-17 (1976) (quotation omitted).

Appellants contend that Johnson offered to make payment in a timely manner but that USFCU hindered his attempts by refusing to accept until Johnson signed a mutual release and until it disposed of certain collateral. An offer of money—without actually producing it—does not constitute a tender of money. *Deering Harvester Co. v.*

Hamilton, 80 Minn. 162, 164, 83 N.W. 44, 44-45 (1900). Mere offers of payment were irrelevant; Johnson did not tender the reduction payment to USFCU until October 2, 2011.

Appellants claim that USFCU also hindered Johnson in his attempts to tender payment because it repeatedly refused his requests for instructions as to where to send the reduction payment. "It is ordinarily the duty of the debtor to seek the creditor for the purpose of making payment, provided the creditor is within his or her state of residence when the payment is due . . . ." 70 C.J.S. *Payment* § 10 (2005) (footnotes omitted). Johnson further contends that the district court improperly made a decision on the merits on this issue, apparently referring to the court's statement that where the parties have been in a lending relationship since 2004, Johnson's argument that he was unaware of how to tender payment to USFCU was not convincing. In light of Johnson's legal duty to ascertain the place of payment, we agree with the district court as a matter of law. The district court correctly ruled in its partial summary judgment that Johnson breached his condition precedent of making the timely reduction payment, and that he failed to show any genuine issue of material fact existing as to his claim that USFCU hindered him in his attempts to do so.

Appellants attempt to reassert this issue in their appeal from the final judgment, contending that this ruling in the partial summary judgment was not res judicata, because the district court later granted appellants' motion to amend the complaint to include a claim for breach of the implied covenant. We note that this is likely explained by the fact that the latter ruling was issued by a different district court judge less than one week after

the issuance of the partial summary judgment. Appellants' claim, that this allows them to argue the issue not only in their appeal from the partial summary judgment, but also to argue it anew in their appeal from the final judgment, has no merit.

II.

Failure to preserve issues for appeal

Appellants next argue that if they did breach the condition precedent by an untimely tender of the reduction payment, their breach was not material, and USFCU failed to provide them with proper notice of default as well as of the 30-day cure period, as required by the forbearance agreement. USFCU asserts that appellants failed to preserve these issues for appeal because they raised the issues for the first time in their request to the district court for leave to move for reconsideration, which was denied, following the partial summary judgment. Generally, this court will not address an issue not raised or decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Appellants respond by arguing in their reply brief that an exception applies because the issues are plainly decisive of the entire controversy on its merits, the facts are undisputed, and neither party has an advantage or disadvantage by not having a prior ruling by the district court on the issues, relying on *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 403 (Minn. 2000). Appellants' issues are far different than the issue addressed in *Oanes*, which applied the exception to consider the legal issue of when a claim for underinsured motorist benefits accrues. *Id.* Further, we note that in their primary brief, appellants explicitly contend that the issue of materiality of a breach is a

fact question to be considered by a jury, while in their reply brief they assert that the facts are undisputed. A new issue cannot be raised for the first time in a reply brief. *See* Minn. R. Civ. App. P. 128.02, subd. 4 (providing that reply brief is limited to new matters raised in respondent's brief). In addition, USFCU would be disadvantaged if these issues were decided by this court for the first time on appeal, because USFCU had no chance to address them in the district court. Appellants failed to preserve this issue for appeal.

III.

Whether Johnson retained an interest in the Bowline membership units at the time USFCU sold them

In the first amendment to the forbearance agreement, Johnson pledged his 6,700 membership units in Bowline LLC as additional collateral. USFCU foreclosed on and took possession of these units on February 9, 2009, and sold them on September 16, 2009. Johnson argues that he nonetheless retained an ownership interest in these units. But this argument is based on the theory that USFCU breached its contract and was then required to perform by releasing him from his guaranties, including the pledge of the Bowline membership units. *See Nodland*, 307 Minn. at 367, 240 N.W.2d at 516-17 (providing that hindrance by promisor will excuse performance of the condition precedent and fix the liability of the promisor). The district court rejected this argument, ruling that Johnson failed to make the reduction payment in a timely manner, did not meet his obligations under the second amendment, and was not entitled to a release of his guaranty obligations—including the Bowline membership units pledge—to USFCU. We agree and do not reach the merits of the arguments regarding Johnson's alleged continued

ownership of the Bowline units, or his other arguments regarding USFCU's foreclosure, possession and sale of the units.

IV.

Johnson's capacity to rent the Bowline units after foreclosure

USFCU took possession of and foreclosed on its security interest in the Bowline membership units on February 9, 2009. On May 15, 2009, Johnson entered into an office lease between Bowline LLC (by Johnson as chief manager of Bowline) and Lovering-Johnson, Inc. (by Johnson as president of the Lovering-Johnson companies). The district court concluded that the lease was invalid because after USFCU's foreclosure on the units as of February 9, 2009, Johnson had no interest in Bowline, and no ability to enter into the Bowline lease on behalf of Bowline. Johnson challenges this ruling on appeal, again based on his argument that he retained ownership and control over Bowline after February 9. We need not address this challenge because we have already rejected Johnson's underlying argument.

V.

Challenge to amount of deficiency judgment

The district court ruled on summary judgment that a deficiency amount from the loans remained in the amount of $3,689,213.29 as of October 15, 2009. Appellants contend that this amount lacks support in the record and seek reversal and remand. USFCU argues that appellants failed to raise this issue to the district court and failed to show a genuine issue of material fact as to the amount of the deficiency. In response, appellants ask this court to exercise its broad discretion under Minn. R. Civ. App. P.

103.04 and remand to the district court, at a minimum, for correction of numerous alleged mathematical errors under Minn. R. Civ. P. 60.01.

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Once the moving party has met its burden of proof, "the burden of producing facts that raise a genuine issue [of material fact] shifts to the opposing party . . . . [S]ummary judgment is proper when the nonmoving party fails to provide the court with specific indications that there is a genuine issue of material fact." *Thiele*, 425 N.W.2d at 583 (citations omitted). USFCU supplied the district court with a statement of undisputed facts, which included information as to the deficiency amount as of October 15, 2009. Our review of the specific arguments that appellants make shows that their disputes concern various factual disputes that should have been raised for the first time in the district court. Appellants have not shown that the district court was presented with disputed issues of material fact and there is no basis to remand to the district court.

VI.

Credit for USFCU's foreclosure of the Johnsons' mortgage

The Johnsons argue that the district court failed to credit them for USFCU's foreclosure of its mortgage on their home. USFCU advised the district court of this error, following entry of the March 24, 2010 judgment. USFCU also advises this court that, in an effort to mitigate its damages, USFCU has allocated $250,000 of the deficiency amount to a second mortgage, security agreement, and financing statement on the

Johnsons' home, so that after this amount is credited, the deficiency amount is $3,439,213.29. Further, with the filing of its brief in the appeal from the final judgment, USFCU asserts that it has partially satisfied the judgment by reducing the amount owed by $250,000, so that the issue requires no more consideration by the court. Relying on USFCU's assurance, this matter appears to be resolved.

VII.

Whether Parkside assigned or merely transferred the Segal note and collateral to USFCU

Parkside brought a replevin claim against USFCU, contending that it retained an ownership interest in a $380,000 note (the Segal note), secured by a mortgage and pledge of securities (the Segal mortgage and Segal pledge), that it had assigned to USFCU as collateral for its loans. On the date of this assignment, USFCU credited Parkside's loan balance by the amount of the Segal note. The district court granted summary judgment in favor of USFCU on Parkside's replevin claim and dismissed it.

A claimant may bring "an action to recover possession of personal property" and may do so prior to final judgment in the matter. Minn. Stat. § 565.21 (2010). "The gist of the action of replevin . . . is to determine the right of possession of personal property or the title thereto." *A & A Credit Co. v. Berquist*, 230 Minn. 303, 305-06, 41 N.W.2d 582, 584 (1950) (quotations omitted).

In its replevin action, Parkside asserted that it retained an ownership interest in the Segal note and collateral even after it assigned its interests to USFCU. The district court concluded that Parkside's Segal interests terminated on the date that it assigned these

interests to USFCU, and USFCU credited Parkside's loan balance for $380,000. Because Parkside had no interest in the Segal note and collateral, the court ruled that Parkside was not entitled to replevin, because it could not show its right to possession or that USFCU was wrongfully detaining its property.

"An assignment is simply the transfer of rights or property." *S O Designs USA, Inc. v. Rollerblade, Inc.*, 620 N.W.2d 48, 54 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Feb. 21, 2001). "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), *review denied* (Minn. Oct. 19, 1993). "If an assignee gives value for the assignment, it is not gratuitous and therefore not revocable." *Id.* (quotation omitted). Parkside contends that its assignment of the collateral was merely a transfer of a security interest, rather than a final assignment that transferred all of Parkside's interests to USFCU.

To reach its conclusion that the assignment was final, the district court examined USFCU's spreadsheets, which showed that USFCU credited Parkside for $380,000 on the same date that Parkside assigned the Segal note and collateral to USFCU, February 5, 2008. The court held that because USFCU reduced Parkside's debt in the amount of $380,000 on the date of the assignment, Parkside received a benefit—the reduction of $380,000 in debt—that it would not have received had the assignment been for security purposes only. And once the debt was reduced, Parkside's Segal interests were no longer collateral.

Parkside contends that there are genuine issues of material fact as to whether USFCU actually credited Parkside for the Segal note of $380,000 on February 5, 2008. USFCU asserts that appellants did not dispute the amount credited in their summary-judgment motion and that this issue is being raised for the first time on appeal. Further, USFCU argues that even now, Parkside does not point to an affidavit in the record from Johnson or a representative from Parkside denying that it received credit for the note. We agree with USFCU that Parkside did not assert any genuine issues of material fact precluding summary judgment. Parkside's argument that USFCU failed to give it certain statutory notice, which rests on an assumption that there is a genuine issue of material fact as to whether it retained an ownership interest in the collateral after assigning that interest to USFCU, has no merit.

VIII.

Motion to amend to add a conversion claim

Appellants next argue that the district court abused its discretion in denying their motion to amend their complaint to add a claim for conversion regarding the Segal collateral, on the theory that USFCU disposed of the Segal collateral without giving appellants notice of disposition. We affirm the district court without further discussion. As stated above, after Parkside made a final assignment of its interests, it retained no ownership interest.

IX.

Johnson's attempts to obtain release of the $300,000 reduction payment deposited with the court

Next, Johnson argues that the district court erred when it refused to release to him the interpleaded funds deposited with the court. On November 17, 2009, the district court granted USFCU's motion for an order requiring appellants to deposit the untimely $300,000 reduction payment with the district court pursuant to Minn. R. Civ. P. 22. In May 2011, appellants sought, alternatively, injunctive relief, a stay of the appeal, or an order releasing the $300,000 reduction payment being held by the court, which the district court denied. And in its summary judgment, the district court ordered that the $300,000 deposit with the court would continue to be held pending appellants' appeal of the March 24, 2010 order. Appellants did not show that the district court erred in these rulings. Appellants ask this court to order the release of these funds. We conclude they should direct this argument to the district court following this appeal.

X.

Deborah Johnson's liability for the deficiency judgment, costs, and attorney fees

Appellants contend that Deborah Johnson should not be jointly and/or severally liable for the deficiency judgment, attorney fees, and costs, claiming that Deborah Johnson was released from the guaranty pursuant to the first amendment to the forbearance agreement. We agree.

In the first amendment to the forbearance agreement, USFCU released Deborah Johnson from her obligations to USFCU as follows:

> Simultaneously with the execution and delivery of this First Amendment and the other documents referenced herein, all personal guarantees and other obligations of DWJ with respect to the Loans and any other obligations of DWJ to Lender shall be extinguished and terminated and DWJ shall have no further obligation or liability to Lender. At such time, Lender shall return all executed originals of the Guaranties of DWJ marked to evidence such release of her liability.

USFCU argues that the release of the guaranty has no effect on her continuing obligations under the forbearance agreement. This argument flies in the face of the full release quoted above.

USFCU also asserts that the release-of-claims section contained in the forbearance agreement provides that in consideration of the forbearance agreement, appellants agreed to release USFCU from all actions, suits, claims or charges arising from the transactions. USFCU asserts that all of the appellants, including Deborah Johnson, breached this provision by bringing the present lawsuit, in which she was a named plaintiff. This issue is close, but under the complete release of Deborah Johnson's obligations in the first amendment, USFCU cannot prevail on this point, so we reverse.

XI.

Parkside's liability for the deficiency judgment

Appellants argue that the district erred to the extent that it awarded judgment against Parkside for the entire deficiency money judgment, because USFCU also released Parkside from all liability to USFCU under the terms of the voluntary foreclosure agreement. Importantly, USFCU then offered in open court to stipulate that Parkside has

no liability beyond costs and attorney fees. This agreement between the two sides' attorneys resolves this issue.

After the deficiency judgment was docketed against Parkside, USFCU sought to have it redocketed for only costs and attorney fees, but the district court refused. Instead, based on USFCU's ex parte request, the district court ordered vacation of the entire judgment against Parkside. As appellants note, "an appeal suspends the trial court's authority to make any order that affects the order or judgment appealed from," Minn. R. Civ. App. P 108.01, subd. 2, so that the district court did not have authority to issue this order. This is all tap dancing around the issue. USFCU released Parkside from liability, and confirmed that in open court on appeal. Accordingly, we agree that vacation of the deficiency judgment against Parkside is appropriate and we remand to the district court to reissue its order once jurisdiction has been returned.

XII.

Appellants' challenges to the award of costs and attorney fees

Next, appellants argue that in the August 31, 2010 summary judgment, the district court erred in granting costs and attorney fees of $43,297.18 to USFCU, based on a particular section concerning attorney fees in the forbearance agreement. Appellants did not raise this issue to the district court, and we decline to address it. *See Thiele*, 425 N.W.2d at 582.

Next, appellants challenge the amount of attorney fees awarded, contending that a portion of the fees is unreasonable or for items unrelated to the lawsuit. USFCU notes that at the hearing on the second motion for summary judgment, it stipulated that it would

reduce its claim for attorney fees and costs in the amount disputed by appellants, $4,304.10. USFCU also advised this court that it has partially satisfied the judgment, including a reduction in the amount owing by $4,304.10, the amount sought by appellants. Accordingly, no reversal or remand is required to remedy this claimed error.

Affirmed in part, reversed in part, and remanded.