STATE OF MINNESOTA
IN COURT OF APPEALS
A11-884

Linda J. Johnson, et al.,
Appellants,

vs.

Nationstar Mortgage, LLC f/k/a Centex Home Equity Company, LLC,
Respondent,

American Equity Mortgage, Inc.,
Defendant.

Filed December 19, 2011
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Wabasha County District Court
File No. 79-CV-10-1117

Amoun Soyaovong, Legal Solutions LLC, St. Paul, Minnesota (for appellants)

Caitlin R. Dowling, Wilford Geske & Cook, P.A., Woodbury, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

Appellants challenge the dismissal of their action concerning respondent's foreclosure on their property, arguing that respondent was precluded from foreclosing

both because it engaged in deceptive trade practices and misapplied the funds appellants paid and because of the doctrine of promissory estoppel. Because the facts alleged in the complaint do not support appellants' promissory-estoppel and deceptive-trade-practices claims, we affirm the dismissal of those claims, but because the district court provided no reasoning for its decision on the claim relating to the application of funds and there is a private cause of action under Minn. Stat. § 58.18, we reverse and remand on that claim.

FACTS

In 2004, appellants Michael and Linda Johnson gave American Equity Mortgage a promissory note for $157,250, secured by a mortgage on appellants' property, and this mortgage was assigned to respondent Nationstar Mortgage.

Appellants defaulted on their mortgage payments, and, after they failed to respond to two loan modification agreements sent by respondent, respondent began foreclosure proceedings and scheduled a sheriff's sale for November 2009.

In October 2009, respondent sent appellants a trial-period plan (the plan) for the federal home affordable modification program (HAMP). Appellants signed and returned the plan, which required them to make payments on November 1, 2009; December 1, 2009; and January 1, 2010; and to furnish information and documentation to see if they would qualify under HAMP. The plan provided that it would terminate on the first day of the month following the month in which the last of the three payments was due, i.e., February 1, 2010. Respondent was required by the plan to suspend pending foreclosure proceedings while the plan was in effect but permitted to resume "any pending foreclosure . . . from the point at which it was suspended if this [p]lan terminates . . . ."

In accordance with the plan, respondent suspended foreclosure proceedings and appellants made the three payments. However, appellants did not submit the necessary information and documentation to determine whether they qualified under HAMP and therefore did not obtain a HAMP loan modification. When the plan terminated on February 1, 2010, appellants were still in default for the May 2009 mortgage payment, and respondent resumed foreclosure proceedings. In March 2010, respondent bought the property at a sheriff's sale; no one had redeemed it by the end of the redemption period six months later.

Appellants brought this action challenging the foreclosure. Respondent moved successfully to dismiss the action with prejudice for failure to state a claim on which relief could be granted under Minn. R. Civ. P. 12.02(e). Appellants challenge the dismissal, arguing that promissory estoppel precluded respondent from foreclosing, that respondent engaged in deceptive trade practices, and that respondent misapplied appellants' funds, causing their default.

D E C I S I O N

When reviewing a dismissal under Minn. R. Civ. P. 12.02(e), "[t]he reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). The standard of review is therefore de novo." *Id.* The question before the reviewing court is whether the complaint sets forth a legally sufficient claim for relief. *Id.* Minn. R. Civ. P. 12.02 also provides that, "if . . . matters outside the pleading are presented to and not excluded by

the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ." The issues on summary judgment are whether a genuine issue of material fact exists and whether the district court erred in its application of the law; the standard of review for both these issues is also de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).[1]

1. Promissory Estoppel[2]

Promissory estoppel requires the consideration of three questions: whether there was a clear and definite promise; whether the promisor intended to induce reliance on the promise and the promisee did in fact rely on it; and whether the promise must be enforced to prevent injustice. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 152 (Minn. 2001). Appellants argue that, because respondent accepted appellants' payments under the plan, respondent was estopped from proceeding with the foreclosure. They claim that "a clear and definite promise between [a]ppellants and [respondent] that [a]ppellants would not be foreclosed upon while they were making payments on the loan modification" existed and was expressed in their "oral loan modification agreement" or their "written contract" with respondent.

But appellants could not have had "an oral loan modification agreement" with respondent because such agreements must be in writing. *See* Minn. Stat. § 513.04 (2010) ("No estate or interest in lands . . . shall hereafter be created, granted, assigned,

[1] Thus, whether the district court construed respondent's motion as a motion to dismiss or a motion for summary judgment, our standard of review is the same.

[2] Appellants' attorney argued the promissory-estoppel issue at the hearing but conceded that the claim was not pleaded in the complaint.

surrendered, or declared, unless by . . . deed or conveyance in writing . . . ."); Minn. Stat. § 513.05 (2010) ("Every contract for . . . the sale of any lands, or any interest in lands, shall be void unless the contract . . . is in writing . . . ."); Minn. Stat. § 513.33. subd. 2 (2010) ("A debtor may not maintain an action on a credit agreement unless the agreement is in writing . . . and is signed by the creditor and the debtor."). Thus, the alleged oral loan modification agreement could not have been the basis for the clear and definite promise required for a promissory-estoppel claim.

The only written agreement between appellants and respondent, other than the mortgage, was the plan. By its own language, it terminated on February 1, 2010, and permitted respondent to resume any pending foreclosure then. Thus, the plan explicitly provided that respondent could resume foreclosure after accepting appellants' three trial-plan payments; it did not estop respondent from doing so.

Appellants' promissory-estoppel argument is unavailing because they fail to show that respondent made a clear and definite promise not to foreclose other than the promise to suspend foreclosure while the plan was in effect.

2. Deceptive Trade Practices

The only remedy availably under the Deceptive Trade Practices Act (DTPA), (Minn. Stat. §§ 325D.43-48 (2010)) (the act) is injunctive relief. Minn. Stat. § 325D.45 (2010). In their complaint, appellants did not seek to enjoin respondent from any trade practice; they sought a declaration that they were the owners of their property, subject to respondent's mortgage. Thus, they had no prospect of relief under the act.

Appellants also rely on Minn. Stat. § 8.31, subd. 3a (2010), permitting "any person injured by a violation of any of the laws referred to in subdivision 1" to bring an action. But the laws specified in subdivision 1 do not include DTPA. Appellants are not entitled to relief under either DTPA or Minn. Stat. § 8.31, subd. 3a.

The dismissal of appellants' claims of promissory-estoppel and deceptive-trade-practices issues is affirmed.[3]

3. Misapplication of Funds

Appellants contend that they were in default on their mortgage payments because respondent misapplied their payments in violation of certain provisions of the Residential Mortgage Originator and Servicer Licensing Act (RMOSLA), namely Minn. Stat. § 58.13, subd. 1 (a) (5), (6) and (16) (2010). At the hearing, respondent argued to the district court that there was no private cause of action under RMOSLA. On appeal, respondent abandoned this argument, citing Minn. Stat. § 58.18, subd. 1 (2010) ("A borrower injured by a violation of [RMOSLA] shall have a private right of action. . . ."

Because there is a private cause of action under the statute and the district court issued no memorandum of law explaining the reasons for the dismissal of that claim, and

[3] Appellants rely on *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 712 (Minn. App. 2000) to argue that the district court was required to explain the dismissal with prejudice. But appellants misread *Brazinsky*: it found an abuse of discretion in a dismissal with prejudice "[b]ecause a legal justification for the dismissal with prejudice . . . [was] not apparent" and no explanation was provided. *Id.* Here, the legal explanations for the dismissal of appellants' counts of promissory estoppel and deceptive trade practices are readily apparent: there was no clear and definite promise, and appellants do not seek the only relief available under DTPA. Thus, the absence of an explanation for the dismissal is irrelevant. Moreover, even if findings were required, any failure to make findings is harmless because the basis for the dismissal was apparent. *See* Minn. R. Civ. P. 61 (requiring harmless errors to be ignored).

may not have considered respondent's other arguments on the issue, we decline to address the issue and reverse and remand it for consideration in light of the correct law. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (appellate court will generally consider only matters presented to and considered by the district court); *see also Radke v. Cnty. of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005) (holding that, on review of a case dismissed for failure to state a claim upon which relief can be granted, "the facts of the complaint are accepted as true and all reasonable inferences are construed in favor of the nonmoving party").

Affirmed in part, reversed in part, and remanded.