STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0455,
A12-0485,
A12-0486

Alliance Bank,
Respondent (A12-455),

Lecy Construction, Inc.,
Plaintiff (A12-485),
Appellant (A12-486),

vs.

Daryll C. Dykes, et al.,
Appellants (A12-455, A12-485),
Respondents (A12-486),

Alliance Bank,
Respondent (A12-485, A12-486),

Old Republic National Title Insurance Company,
Respondent (A12-485, A12-486),
and
Daryll C. Dykes, et al.,
third party plaintiffs,
Appellants (A12-455, A12-485),

vs.

Alliance Bank,
third party defendant,
Respondent (A12-485),

Alliance Bank, et al.,
Third Party Defendants (A12-486),

Old Republic National Title Insurance Company,

third party defendant,
Respondent (A12-455, A12-485),

Emigrant Mortgage Company, Inc., a New York corporation,
Third Party Defendant (A12-455, A12-485),
Respondent (A12-486).

Filed December 31, 2012
Affirmed
Chutich, Judge

Ramsey County District Court
File Nos. 62-CV-09-10096; 62-CV-09-7761

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Chutich, Judge.

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

CHUTICH, Judge

In this foreclosure-related dispute, appellants Daryll and Sharon Dykes, and respondent and cross-appellant Lecy Construction, Inc. (Lecy), asserted a number of

claims against respondents Alliance Bank, Old Republic National Title Insurance Company, and Emigrant Mortgage Company. The district court granted summary judgment to respondents on all of appellants' and cross-appellant's claims.

On appeal from summary judgment, the Dykeses argue that the district court erred by (1) concluding that their claims and defenses are barred by the statute of frauds and the statute of limitations; (2) denying a motion to compel discovery; and, (3) granting Alliance Bank attorney fees. Cross-appellant Lecy contends that the district court erred by (1) granting summary judgment because genuine issues of material fact exist; (2) determining that its claims are barred by the statute of frauds and the statute of limitations; (3) ruling that the theory of respondeat superior did not apply; and (4) denying a number of other motions brought by Lecy. Because we conclude that the district court properly granted summary judgment on all claims, we affirm.

FACTS

These three consolidated appeals arise from the financing and construction of a multi-million dollar home for the Dykeses. The Dykeses hired Lecy to build the home. The Dykeses secured financing from Emigrant Mortgage Company (Emigrant), Alliance Bank (Alliance), and Lecy to purchase the home after construction was completed. An employee of Old Republic National Title Insurance (Old Republic) conducted the closing on the notes. The following are the relevant and, unless otherwise noted, undisputed underlying facts.

In early 2002, Daryll Dykes, a surgeon who had just joined an orthopedic surgical practice after finishing his residency and a fellowship, began a banking relationship with

Alliance. His wife Sharon, a surgeon as well, was still completing her residency in 2002. The Dykeses worked with Susan Theimer, the vice president of an Alliance branch, to secure a home-equity line of credit.

Later that year, the Dykeses became interested in purchasing lake-front property in Arden Hills. They intended to purchase the property, tear down the existing house, and build a custom home. Daryll Dykes contacted Theimer about possible financing, and Theimer promised him that Alliance would extend the financing for the purchase of the land and construction of the home. The Dykeses specifically claim that Theimer promised them a 15- or 30-year mortgage at a 2% annual interest rate to cover the entire cost of the project. Theimer denies ever promising the Dykeses a mortgage on those terms, and the record shows that interest rates for "jumbo" loans, the type of loan that the Dykeses would have required, were between 5% and 7% at that time.

In December 2002, the Dykeses purchased the lake-front property with an unsecured variable-rate loan from Alliance for $627,800. Theimer approved the loan for the Dykeses although the loan amount exceeded her lending authority. Theimer also failed to get approval from Alliance's Executive Loan Committee to extend the loan, as was Alliance's customary practice. When Theimer approved the loan, the Dykeses would likely not have qualified for the loan because of their relatively low credit scores and combined annual gross income, then approximately $200,000.[1] In February 2003,

[1] In fact, the record shows that, because of his low credit score, Daryll Dykes had previously been unable to finance a motorcycle through another bank or the dealership. The record also shows that the Dykeses expected their income to grow substantially in the future, and that, in 2005, they earned well over $1 million.

the Dykeses refinanced the loan and secured it with the purchased property at the same variable interest rate.

The Dykeses hired Lecy, a Minnesota corporation with over thirty years' experience constructing luxury homes, to build their new house. Roy Lecy, who has a B.A. in business and a M.A. in finance, handled Lecy's sales and financing and was personally involved in the Dykeses' project. The Dykeses and Lecy entered into a construction agreement on January 28, 2003, which estimated the cost of the home to be about $1.8 million. Lecy financed the construction of the house with its own line of credit.

Construction on the 13,000-square-foot house began in early 2003. During construction, Lecy encountered some engineering issues and the Dykeses upgraded the home's features, which increased its cost by over $1 million dollars, from $1.8 to $2.9 million, an increase of over sixty percent. When additional costs arose, the Dykeses claim that Daryll Dykes and Roy Lecy spoke with Theimer to confirm that the final financing could cover the increased cost.[2] According to the Dykeses, Theimer said that the increased price would not be an issue.

To close on the new house, the Dykeses needed financing to cover the costs of the entire project, including the final cost of construction—$2.9 million—as well as the original Alliance loan used to purchase the property, for a total of approximately $3.5 million. On or about December 8, 2003, Theimer informed the Dykeses that there was a

[2] Roy Lecy testified in his deposition that he did not provide change orders to Alliance or inform it of the increase in price.

"glitch" with the financing because of the Dykeses' credit issues. On December 9, 2003, Daryll Dykes informed Lecy of the problem and asked if Lecy could carry some of the construction costs at closing. Lecy initially agreed to loan the Dykeses $800,000, and later, before closing, agreed to increase the loan's amount to $1.1 million.

By December 24, 2003, the Dykeses were prepared to close on their home with the following financing: a first priority loan for $1 million from Emigrant (Emigrant note), a second priority loan for $1.6 million from Alliance Bank (Alliance note), and a third priority loan for about $1.1 million from Lecy (Lecy note). Each note was secured by a mortgage associated with that particular note. According to the Dykeses and Lecy, Theimer represented that this financing package was "temporary" and only for a couple months until Alliance could provide the Dykeses with permanent financing. By their terms, the Emigrant note was a high-interest variable rate loan amortized over 30 years, while the Alliance and Lecy notes contained shorter maturity dates, 24 months and 13 months, respectively.

Julie Perusse of Old Republic handled the closing for all three loans on December 24, 2003.[3] In attendance at the closing were Perusse, the Dykeses, and Roy Lecy. Just before closing, Emigrant sent instructions to Perusse for the Emigrant note, which stated that "[a]ll existing liens on subject property must be discharged and removed at closing," and that "no further liens may be placed on the property without

[3] Alliance, Old Republic, and Emigrant dispute that this closing included all three loans. They contend that only the Emigrant note was closed on December 24, 2003, and that the Alliance and Lecy notes were signed at a later date. The precise dates of when the closings took place are not relevant to our decision because the record demonstrates that Lecy agreed to provide a third-priority mortgage.

Emigrant's prior written consent." The Dykeses signed the documents for all of the notes and moved into their home on December 25, 2003.

Lecy received approximately $1.8 million from the Emigrant and Alliance notes which, given the $2.9 million cost of the home, meant Lecy was still owed the $1.1 million reflected in the Lecy note. Shortly after the closing, Lecy informed Daryll Dykes that it had received $20,000 less than it should have from the disbursement of the Emigrant note. Lecy contacted Perusse, and she told him that there was an error "in the numbers that Sue Theimer had put together and the numbers are what they were." Lecy did not inquire further, cashed the check, and passed the $20,000 cost onto the Dykeses.

Daryll Dykes also contacted Theimer about the discrepancy. Theimer informed him that the missing funds were the "amount to record the mortgages" and later described it as a "miscellaneous debit of $16,000." Despite receiving these inconsistent explanations, the Dykeses did not pursue the matter further.

In October 2004, Alliance discovered that Theimer had been exceeding her lending authority by extending multiple loans that did not meet the generally accepted banking and lending practices of Alliance. It terminated Theimer's employment in December 2004. The following year, the Federal Deposit Insurance Corporation conducted a routine audit of Alliance's files and discovered that Theimer and Darrell Mullerleile, the branch president, had been stealing funds from loan closings, including $16,000 from the transaction involving the Dykeses. *See U.S. v. Theimer*, 557 F.3d 576, 577 (8th Cir. 2009). Theimer and Mullerleile were charged and convicted in federal court for various crimes, including embezzlement and theft.

The Dykeses made payments on the three notes for several years and refinanced the Alliance and Lecy notes during that time to extend the length of the loans. In 2005, and again in 2007, the Dykeses refinanced the Alliance loan, each time extending the balloon payment two more years. The Dykeses also refinanced the Lecy note in 2005, and in 2008, to extend the loan's length.

The Dykeses defaulted on the Alliance note in November of 2008. The Dykeses then defaulted on the Emigrant loan in early 2009. Around the same time, they also defaulted on the Lecy note. Emigrant foreclosed on its mortgage by action due to the Dykeses' failure to make their mortgage payments. A sale foreclosing the Emigrant mortgage occurred for the Arden Hills property on September 17, 2010.

The Litigation

In 2009, Lecy sued the Dykeses for breach of the note and foreclosure of its mortgage to recover the unpaid construction costs. Lecy initially included Alliance and Emigrant as parties to its foreclosure action because they each had liens on the Dykeses' property. After Lecy filed suit, Lecy, Alliance, and Emigrant signed stipulations regarding the priority of the loans. In the stipulations, the parties agreed that Emigrant had first priority, Alliance's note had second priority, and that Lecy had third priority. The stipulations also dismissed Alliance and Emigrant from the action.

Lecy subsequently moved to re-add Alliance and Emigrant as defendants and asserted a variety of claims against them including fraudulent misrepresentation, negligence, promissory estoppel, unjust enrichment, and equitable subordination. Lecy then added Old Republic to the action, asserting a number of similar claims against it.

Also in 2009, Alliance commenced a separate action, suing the Dykeses on the Alliance note. The Dykeses asserted counterclaims against Alliance for fraudulent misrepresentation, declaratory judgment, negligent misrepresentation, promissory estoppel, and breach of fiduciary duty.

The district court consolidated the two actions for pretrial purposes. After consolidation, Lecy and the Dykeses filed a number of amended complaints to add additional claims against Alliance, Old Republic, and Emigrant.

In June 2010, Alliance moved for summary judgment on its claims against the Dykeses, on the Dykeses' counterclaims, and on Lecy's claims. The district court granted summary judgment in favor of Alliance on Lecy's claim for breach of fiduciary duty, but denied Alliance's motion on all other claims. The district court concluded that summary judgment was premature and genuine issues of material fact existed because discovery was incomplete.

In early 2011, Alliance, Old Republic, Emigrant, and Lecy filed cross-motions for summary judgment. The district court then issued a series of orders on the motions. The district court granted Emigrant's motion for summary judgment, and denied Lecy's motion for partial summary judgment against Emigrant. The district court granted Old Republic's motion for summary judgment, and denied Lecy's motion for partial summary judgment against Old Republic. The district court granted Alliance's motion against

Lecy and the Dykeses, and denied Lecy's motion for partial summary judgment against Alliance.[4] The district court also awarded Alliance its attorney fees against the Dykeses.

The district court entered judgment on the various orders in the lawsuits on January 18, February 8, and February 24, 2012. The Dykeses and Lecy have filed three appeals from those judgments and this court consolidated the appeals.

D E C I S I O N

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 70 (Minn. 1997).

"We review a decision to grant or deny summary judgment de novo." *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn. 2010). Appellate courts do not resolve issues of fact but only determine whether factual issues exist and whether the district court erred in applying the law to the facts. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000). In doing so, we construe the facts in the light most favorable to the opposing parties, and we review questions of law de novo. *Bearder v. State*, 806 N.W.2d 766, 770 (Minn. 2011).

[4] In a separate order, the district court granted Lecy partial summary judgment against the Dykeses in the amount of $1,746,878.77. This judgment is not being appealed.

I. Propriety of Granting Summary Judgment to Alliance on the Dykeses' Claims and Defenses

A. Minn. Stat. § 513.33 (Statute of Frauds)

The district court granted Alliance summary judgment on the Dykeses' claims for fraud, promissory estoppel, and negligent misrepresentation because it concluded that these claims were barred by the statute of frauds relating to credit agreements, Minn. Stat. § 513.33 (2010).[5] We agree.

Under Minn. Stat. § 513.33, a debtor "may only recover on an action stemming from a credit agreement if the agreement is in writing." *Fronning v. Blume*, 429 N.W.2d 310, 314 (Minn. App. 1988), *review denied* (Minn. Nov. 30, 1988); *see also BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 902–03 (Minn. App. 2010) (holding that, as a matter of law, Minn. Stat. § 513.33 bars any claim or defense based solely on an alleged oral credit agreement), *review denied* (Minn. May 18, 2010). Minn. Stat. § 513.33, subd. 2, specifically states that "[a] debtor may not maintain an action on a credit agreement unless the agreement is in *writing*, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." (Emphasis added.)

The Dykeses' relationship with Alliance is a relationship between a debtor and a creditor. *See id.*, subd. 1(2), (3). Thus, the primary issue here is whether the Dykeses'

[5] The district court also concluded that Minn. Stat. § 513.33 barred the Dykeses' claim against Alliance for declaratory judgment. The Dykeses had already waived this claim by failing to assert it in their amended complaint against Alliance filed on September 9, 2010.

claims for fraudulent misrepresentation, promissory estoppel, and negligent misrepresentation stem from a credit agreement as defined by the statute.

A "credit agreement," as the term is used in section 513.33, refers not only to an agreement to lend money but also to an agreement to "forbear repayment of money, . . . to otherwise extend credit, or to make any other financial accommodation." *Id.*, subd. 1(1). As the district court concluded, the Dykeses' claims are "based on the allegation that Alliance Bank employees made promises that the Dykes[es] would obtain future permanent financing that would replace the loans executed by [the] Dykes[es] in 2003." The statute specifically states that such a promise—a creditor's promise to enter into a new credit agreement—must be in writing to be enforceable. Minn. Stat. § 513.33, subd. 3(3).

The facts here are similar to those of *Greuling v. Wells Fargo Home Mortg., Inc.*, 690 N.W.2d 757 (Minn. App. 2005). In *Greuling*, the debtor claimed that the bank induced him to enter into a loan with unfavorable terms because the bank promised to refinance the loan immediately after the closing. *Id.* at 759. After closing, the debtor contacted the creditor and was told that he had to wait six months before refinancing. *Id.* The debtor made only one payment on the loan and the creditor foreclosed. *Id*. The debtor asserted a claim for promissory estoppel against the creditor. *Id.* at 761–62. This court concluded that the creditor's promise to refinance was an agreement to enter into a new credit agreement, and that, because the promise of future financing was not reduced to writing, the "plain and unambiguous language of the statute" clearly prohibited the debtor's promissory estoppel claim. *Id.* at 762.

Here, like *Greuling*, the Dykeses' claims are based on Theimer's oral promise that Alliance would provide them with "permanent financing" at more favorable rates after they closed on their temporary loans.[6] This alleged oral promise is clearly a credit agreement as defined by section 513.33. Under Minn. Stat. § 513.33, the Dykeses cannot maintain *any* action on Theimer's oral promise to enter into a new credit agreement, because that oral promise does not satisfy the writing requirements of the statute.

The Dykeses contend that *Greuling* does not support the district court's conclusion that Minn. Stat. § 513.33 bars their claim of negligent misrepresentation. The Dykeses are correct that in *Greuling*, this court did not hold that plaintiff's negligent misrepresentation claim was barred by section 513.33, but this ruling was not because it concluded that the statute *could not* bar a claim for negligent misrepresentation. *See* 690 N.W.2d at 760–61. Rather, in *Greuling*, the district court granted summary judgment on the negligent-misrepresentation claim because no genuine issue of material fact existed as to whether the debtor had relied on the alleged misrepresentation.[7] Therefore, this court independently analyzed the reasoning of the district court on the negligent-misrepresentation claim. *Id.* at 760–61. This court's decision in *Greuling* thus does not

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[6] Notably, unlike *Greuling*, however, the Dykeses performed under these "temporary notes" for almost five years before defaulting.

[7] "[A] person makes a negligent misrepresentation when (1) in the course of his or her business, profession, or employment, or in a transaction in which he or she has a pecuniary interest, (2) the person supplies false information for the guidance of others in their business transactions, (3) another justifiably relies on the information, and (4) the person making the representation has failed to exercise reasonable care in obtaining or communicating the information." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 369 (Minn. 2009).

prevent application of Minn. Stat. § 513.33 to the Dykeses' negligent-misrepresentation claim.

The Dykeses attempt to frame their claims as based on something other than Theimer's oral promise of future financing. Specifically, they argue that their claims are based on the *temporary loans* that they entered into, which clearly satisfy the writing requirements of Minn. Stat. § 513.33. This argument is unpersuasive. As Daryll Dykes stated in his deposition: "My claim is that Susan Theimer promised to give me a 15[-] or 30-year mortgage at my discretion at 2 percent that was going to cover the entire cost of the project. That's my claim in its entirety, she didn't do it."

Despite the Dykeses' characterization of their claims, the record shows that their causes of action are based on Theimer's alleged oral promise of future financing, which is clearly a "credit agreement" as defined by section 513.33. Claims based on alleged oral promises are precisely the types of claims that the statute was created to address. *Rural Am. Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 705 (Minn. 1992) ("The Minnesota credit agreement statute was enacted in 1985 to protect lenders from having to litigate claims of oral promises to renew agricultural loans. The credit agreement statute was passed to prevent litigation of such difficult claims."). Allowing the Dykeses to avoid application of Minn. Stat. § 513.33 by basing their claims on the temporary loans would defeat the statute's purpose. Thus, we conclude that the district court properly determined that the Dykeses' claims against Alliance are barred by Minn. Stat. § 513.33.

Partial Performance

The Dykeses alternatively argue that their partial performance on Theimer's oral promise prevents application of the statute of frauds. To be sure, a contract may be taken out of the statute of frauds by partial performance. *See* Minn. Stat. § 513.06 (2010) ("Nothing in this chapter contained shall abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance thereof."); *Starlite Ltd. P'ship v. Landry's Rests., Inc.*, 780 N.W.2d 396, 399–400 (Minn. App. 2010). This exception to the statute of frauds applies when a party is seeking specific performance.[8] *See* Minn. Stat. § 513.06.

Specifically, the Dykeses claim that they have partially performed on the promise of future financing because they entered into the temporary loans and made payments on the temporary loans for several years. The Dykeses' argument is unpersuasive. While the Dykeses have clearly performed on the temporary loans, we fail to see how entering into a written loan agreement and performing on that written loan agreement for several years can be construed as partial performance of a separate, unwritten loan agreement.

Thus, we agree with the district court's conclusion that Alliance is entitled to summary judgment on the Dykeses' fraud, negligent-misrepresentation, and promissory-estoppel claims because they are barred by Minn. Stat. § 513.33.

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[8] Alliance incorrectly claims that the Dykeses are not seeking specific performance. A reading of the complaint, however, demonstrates that they ask the court to require: "Alliance Bank to refinance all encumbrances on the Real Property with terms consistent with the promises made to the Dykes[es]." Thus, we consider the Dykeses' partial performance argument. We do note, however, that this request is unusual as the record reflects that Emigrant owns the home and the Dykeses no longer reside in it.

B. Fraud-in-the-Inducement Defense

The district court granted Alliance summary judgment on its claims for breach of contract under the notes. In doing so, the district court concluded that the statute of frauds also barred the Dykeses' affirmative defense of fraudulent inducement.

The Dykeses argue that this ruling is erroneous because their defense of fraudulent inducement created a genuine issue of fact. To support their argument, the Dykeses rely on *Kasson State Bank v. Haugen*, 410 N.W.2d 392 (Minn. App. 1987) and *Stubblefield v. Gruenberg*, 426 N.W.2d 912 (Minn. App. 1988).[9] Neither case, however, supports their contention that a fraudulent-inducement defense prevents the grant of summary judgment based on Minn. Stat. § 513.33.

In *Kasson*, the debtor claimed that a bank employee fraudulently induced him to take out a loan from the bank to buy stock in an ailing company. 410 N.W.2d at 393. When the debtor defaulted on the loan and the bank initiated legal proceedings against him, the debtor asserted a fraudulent-inducement defense. *Id*. at 393–94. The debtor's defense was based on the bank employee's promise that the debtor would be issued stock in the company. *Id*. at 393. A promise of stock is not a "credit agreement" under Minn. Stat. § 513.33, however, and the *Kasson* court did not address the statute. Thus, *Kasson* does not support the Dykeses' contentions.

[9] The Dykeses also cite *Vandeputte v. Soderholm*, 298 Minn. 505, 216 N.W.2d 144 (1974) and *King v. Int'l Lumber Co.*, 156 Minn. 494, 195 N.W. 450 (1923). These cases, however, were decided well before the enactment of Minn. Stat. § 513.33 and therefore are not persuasive.

In *Stubblefield*, the debtor asserted a fraudulent-inducement defense to a creditor's action based on a written promissory note. 426 N.W.2d at 913. The court granted summary judgment after concluding that the debtor's defense merely recited the elements of fraud, and did not plead fraud with particularity. *Id*. at 914–15. Thus, *Stubblefield* does not support the Dykeses' contention that a fraudulent-inducement defense prevents summary judgment based on Minn. Stat. § 513.33.

Here, like their counterclaims against Alliance, the Dykeses' fraudulent-inducement defense is based on Theimer's oral promises of future financing. Thus, the district court properly concluded that Minn. Stat. § 513.33 barred the Dykeses' affirmative defense as well. *See BankCherokee*, 779 N.W.2d at 903 ("[T]he supreme court has implicitly recognized that section 513.33 applies to affirmative defenses."). Moreover, because the district court properly concluded that section 513.33 barred the Dykeses' defense of fraud, it is immaterial whether genuine issues of material fact regarding the defense existed.

C. Breach of Fiduciary Duty

The Dykeses next argue that the district court erred in concluding "as a matter of law that no fiduciary relationship existed" between the Dykeses and Alliance, and granting Alliance summary judgment on the Dykeses' claim of breach of fiduciary duty by Alliance.[10] A fiduciary relationship has two characteristics: "superiority of knowledge

[10] The district court also correctly concluded that the Dykeses' claim of breach of fiduciary duty was barred by section 513.33, which clearly states that "[a] credit agreement may not be implied from the relationship, *fiduciary* or otherwise, of the creditor and the debtor." Minn. Stat. § 513.33, subd. 3(3)(b) (emphasis added).

of one party and confidence reposed by the other." *Vacinek v. First Nat. Bank of Pine City*, 416 N.W.2d 795, 799 (Minn. App. 1987). "A bank is generally not its customer's fiduciary unless the bank knows or ought to know its customer is placing confidence in the bank." *Id.*

Here, the first element—superiority of knowledge—is satisfied because Theimer had superior knowledge of Alliance's lending guidelines and banking practices. To establish a fiduciary relationship, however, the Dykeses must also demonstrate that the bank knew or ought to have known that they were placing confidence in the bank. *See id.* No evidence in the record shows that the Dykeses informed Theimer and Alliance that they were placing special trust and confidence in the bank. *See id.* at 800 ("[The plaintiffs] never told anyone at the bank that they expected the bank to look out for their interests."). The Dykeses attempt to satisfy this element by highlighting their ongoing relationship with Theimer. But, under Minnesota law, an ongoing banking relationship is insufficient to establish a fiduciary relationship. *Id*. ("The fact that [the plaintiff] was a long time customer of the bank is insufficient, by itself, to establish a fiduciary relationship."). Thus, the district court properly concluded that no fiduciary relationship existed and granted Alliance summary judgment on the claim.

D. Consumer Fraud Act

The district court also granted Alliance summary judgment on the Dykeses' consumer-fraud claim, because the Dykeses failed to raise a fact issue about whether the claim provided a public benefit as required under the statute. The Minnesota Consumer Fraud Act prohibits "[t]he act, use, or employment by any person of any fraud, false

pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise." Minn. Stat. § 325F.69, subd. 1 (2010).

Private citizens may bring claims under the act if they can "demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). A public benefit may exist when a claim is based on a misrepresentation that is made to the general public. *See Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816, 821 (Minn. App. 2001) (stating that "the prevention of false or misleading advertising is a public benefit"), *aff'd*, 655 N.W.2d 320 (Minn. 2003). But a public benefit does not exist when the claim is based on "a single one-on-one transaction in which the fraudulent misrepresentation . . . was made only to appellant." *Ly*, 615 N.W.2d at 314.

The Dykeses assert that their claim has a public benefit because Theimer and Mullerleile defrauded numerous other Alliance customers. We disagree. While the Dykeses may be correct that Theimer made representations to other debtors about potential financing, the Dykeses' claims are based solely on representations that Theimer made directly to them: specifically, that she would provide a 2% 15- or 30-year mortgage. These claims were made in a one-on-one setting, *see Ly*, 615 N.W.2d at 314, and were not advertised to the public at large. *Cf. Collins*, 636 N.W.2d at 821.

The Dykeses attempt to link their claim to Theimer and Mullerleile's fraudulent scheme of embezzling funds from Alliance and its customers. But the Dykeses' allegations that Theimer promised them favorable financing have no connection to the embezzlement scheme for which Theimer and Mullerleile have been prosecuted and

convicted. Therefore, the district court properly concluded that the Dykeses' consumer-fraud claim failed due to a lack of public benefit.

E. Attorney Fees

The Dykeses also challenge the district court's award of attorney fees to Alliance. We review such awards for an abuse of discretion. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 904 (Minn. App. 1995), *review denied* (Minn. Jan. 25, 1996).

Alliance sought attorney fees in the amount of $381,155.50 against the Dykeses under the note's provision for attorney fees. The district court concluded that the request was reasonable considering "the amount of time involved, the complexity of the issues raised, the experience and ability of counsel, the hourly rates charged and the results obtained," and granted the motion.

The Dykeses do not dispute that Alliance was entitled to attorney fees, but argue that Alliance incurred some of the fees litigating claims asserted by other parties. Alliance counters that "any time spent by Alliance in defending claims solely brought by Lecy or which related solely to Emigrant Mortgage Company or Old Republic National Title Insurance Company are not included in the attorneys' fee sought against the Dykes[es]." Our review of the record supports Alliance's position. Thus, we conclude that the district court did not abuse its discretion by awarding Alliance attorney fees.

II. The Dykeses' Claims Against Old Republic

The Dykeses next argue that the district court erred in determining that their claims against Old Republic were barred by Minnesota's six-year statute of limitations.

See Minn. Stat. § 541.05, subd. 1 (2010). "[W]hether the [district] court erred in applying the law regarding the accrual of the cause of action and the running of the statute of limitations," is a question of law, which we review de novo. *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006) (quotation omitted). A cause of action accrues "when the plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted." *Id.* at 335.

The Dykeses filed two complaints in the consolidated cases asserting claims against Old Republic: one against Alliance and Old Republic and one against Old Republic and Emigrant. In both complaints, the Dykeses assert the following identical claims against Old Republic: fraudulent misrepresentation, negligent misrepresentation, negligence, aiding and abetting fraudulent misrepresentation, aiding and abetting breach of fiduciary duty, and civil conspiracy. In their complaint against Alliance and Old Republic, the Dykeses also asserted claims for breach of fiduciary duty and violation of the consumer-fraud act against Old Republic.

The district court concluded that the statute of limitations began to run for all of the Dykeses' claims against Old Republic in "December 2003 when the closing funds were improperly paid." The court concluded that the "discrepancy" in the closing funds put the Dykeses on notice of their claims because the "Dykes[es] knew something was not quite right." Because the Dykeses did not file a complaint against Old Republic until September of 2010, more than six years after the closing, the district court granted summary judgment to Old Republic.

The district court, however, misconstrued the nature of the Dykeses' claims against Old Republic because those claims were not based on the missing closing funds. Rather, the Dykeses' claims against Old Republic were based on their allegation that the Emigrant note prohibited subordinate financing and also that Old Republic was aware of Alliance's misrepresentations about future financing. While the Dykeses were aware of the discrepancy in disbursed funds shortly after the closing took place, such knowledge would not alert them to their claims against Old Republic. Thus, the district court erred in concluding that the statute of limitations for the Dykeses' claims began to run shortly after the closing.

Nevertheless, summary judgment on the Dykeses' claims against Old Republic was appropriate. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012) ("[W]e may affirm a grant of summary judgment if it can be sustained on any grounds."). First, summary judgment was appropriate because the Dykeses failed to create a fact issue about causation, an essential element to their claims for fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, and negligence.[11] These claims are based on the Dykeses' contention that the Emigrant note prohibited subordinate financing. To support this contention, the Dykeses point to

[11] All of these claims require the plaintiffs to demonstrate that their damages were caused by the defendant's wrongful conduct. *See Valspar*, 764 N.W.2d at 369 (negligent misrepresentation); *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 318 (Minn. 2007) (fraudulent misrepresentation); *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (negligence); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989) (noting that the elements of a negligence claim (duty, breach, causation, damages) are the same elements required for a claim of breach of fiduciary duty), *review denied* (Minn. Nov. 15, 1989).

Emigrant's closing instructions, which state that "[a]ll existing liens on subject property must be discharged and removed at closing" and "no further liens may be placed on the property without Emigrant's prior written consent." The actual mortgage and associated note, however, *do not* prohibit subordinate financing. The Emigrant mortgage prohibits liens that would have priority over the Emigrant note, but contemplates the possibility of subordinate financing.

Because Emigrant's note did not prohibit subordinate financing, its foreclosure action against the Dykeses was unrelated to the subordinate Alliance and Lecy notes. Emigrant foreclosed solely because the Dykeses failed to make the required payments on Emigrant's note. Thus, the Dykeses' damages—numerous judgments against them for defaulting on the notes—do not arise from Emigrant's closing instructions. Because no fact issue exists about whether Old Republic's failure to follow Emigrant's closing instructions *caused* the Dykeses' damages, summary judgment was appropriate on the claims for fraudulent and negligent misrepresentation, breach of fiduciary duty, and negligence.

The Dykeses also asserted a civil conspiracy claim against Old Republic, alleging that Old Republic conspired with Alliance "to make false representations to the Dykes[es] to induce them into closing on three . . . loans." A claim for civil conspiracy requires the conspirators to have a meeting of the minds as to plan or purpose of action to achieve a certain result. *Bukowski v. Juranek*, 227 Minn. 313, 318, 35 N.W.2d 427, 429 (1948). An underlying tort must be present to support such a claim. *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997).

No evidence in the record demonstrates that Old Republic and Alliance had a meeting of the minds to fraudulently induce the Dykeses to enter into the loans. Thus, as the district court ruled, "the Dykes[es] have not pointed to specific facts sufficient to overcome summary judgment" on the civil conspiracy claim. In addition, because summary judgment is appropriate on the Dykeses' claims against Alliance, their claim against Old Republic for civil conspiracy fails because it is not supported by an underlying tort.

Summary judgment is also appropriate on the Dykeses' claims against Old Republic for aiding and abetting fraud and breach of fiduciary duty. The elements of a claim for aiding and abetting the tortious conduct of another are: "(1) the primary tort-feasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tort-feasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach." *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999).

Accordingly, the Dykeses must demonstrate that Old Republic knew that Alliance lied to the Dykeses, inducing them to enter into the three temporary loans. Not only is the record devoid of evidence that Old Republic conspired with Alliance, the Dykeses point to no evidence that Old Republic had *any* knowledge that the three loans were "temporary" or that Alliance promised a 2% mortgage. Because no genuine issues of material fact exist regarding the second element of their aiding and abetting claims,

summary judgment is appropriate.[12] *See DLH*, 566 N.W.2d at 71 (stating that summary judgment is appropriate when the evidence "is not sufficiently probative with respect to an essential element of the nonmoving party's case").

Summary judgment is also appropriate on the Dykeses' claim against Old Republic for violation of the consumer-fraud act. *See* Minn. Stat. § 325F.69. This claim, like the identical claim asserted against Alliance, fails because the Dykeses cannot demonstrate that their claim has a public benefit. *Ly*, 615 N.W.2d at 314.

Thus, we affirm the district court's grant of summary judgment to Old Republic on all of the Dykeses' claims.

III. Lecy's Claims Against Alliance

A. Statute of Frauds

Lecy contends that the district court erred by dismissing its claims for fraudulent misrepresentation, negligent misrepresentation, negligence, and promissory estoppel as barred by Minn. Stat. § 513.33. We agree. Lecy's argument presents a question of statutory interpretation, which we review de novo. *See In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007).

[12] Summary judgment is also appropriate on the Dykeses' claim of aiding and abetting a breach of fiduciary duty against Old Republic under the first element of such a claim because it is contingent on the conclusion that Alliance breached its fiduciary duty. *See Witzman*, 601 N.W.2d at 187 (stating that to sustain a claim for aiding and abetting breach of fiduciary duty, "the primary tort-feasor must commit a tort that causes an injury to the plaintiff"). As discussed above, the district court properly granted summary judgment against the Dykeses in favor of Alliance on the claim of breach of fiduciary duty. Therefore, Old Republic is entitled to summary judgment on the claim of aiding and abetting breach of fiduciary duty.

As previously discussed, section 513.33 precludes a "*debtor*" from maintaining an action against a creditor on a credit agreement unless it is written. Minn. Stat. § 513.33, subd. 2 (emphasis added). Minn. Stat. § 513.33 defines a debtor as "a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor." Subd. 1(3). Under the statute, a creditor is a "person who extends credit under a credit agreement with a debtor." *Id.*, at subd. 1(2). Lecy does not fit the definition of a debtor because it did not seek or obtain a credit agreement from, or owe money to, Alliance. Furthermore, Alliance was not Lecy's creditor because it was not "extend[ing] credit under a credit agreement with [Lecy]." *Id.* Because Lecy is not a debtor, the statute does not apply to its claims against Alliance. Thus, we conclude that the district court erred in dismissing Lecy's claims for fraudulent misrepresentation, negligent misrepresentation, negligence, and promissory estoppel as barred by Minn. Stat. § 513.33.

B. Reasonable Reliance

The district court alternatively concluded that Lecy's reliance on Theimer's oral representations was not reasonable. Claims of fraud, negligent misrepresentation, and promissory estoppel require a plaintiff to demonstrate reasonable reliance upon the defendant's representations or promises. *See Valspar*, 764 N.W.2d at 369 ("[A] person makes a negligent misrepresentation when . . . another justifiably relies on the information . . . ."); *Hoyt Props.*, 736 N.W.2d at 318 (stating that a party must demonstrate reasonable reliance for a fraudulent-misrepresentation claim); *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000) ("[T]he first element of

promissory estoppel . . . [requires] that the promisor should reasonably expect to induce action or forbearance on the part of the promisee."). "Whether a party's reliance is reasonable is ordinarily a fact question for the jury unless the record reflects a complete failure of proof." *Hoyt Props.*, 736 N.W.2d at 321.

Lecy's claims against Alliance are based on Theimer's alleged representations that the Dykeses were "good as gold" and that permanent financing would be available to cover the entire cost of the project. The district court determined that these representations were "vague" and "could not have been reasonably relied upon given the entire history of dealings that took place." We agree. Theimer never told Lecy any details about the permanent financing or explained what she meant by "good as gold." Roy Lecy never requested more information from Theimer or investigated the Dykeses' financial situation on his own.

Lecy relies on an expert affidavit to support its contention that a fact issue exists as to whether its reliance was reasonable. Lecy's expert opined that, under the circumstances of this case, Lecy would have been justified in relying on Theimer's representations. The expert's opinion, however, does not take into account the undisputed facts in the record. Most importantly, the opinion does not consider that Lecy was informed that the Dykeses had credit problems *before* the parties closed on the loans. On December 9, 2003, Daryll Dykes told Roy Lecy that an issue arose with the Dykeses' ability to qualify for full financing and requested Roy Lecy to "carry back" some of his construction costs. Lecy initially agreed to finance $800,000 for the home and ultimately loaned the Dykeses $1.1 million to purchase the constructed home. On this record, the

expert's opinion does not create a fact issue that precludes summary judgment. *See Potter v. Pohlad*, 560 N.W.2d 389, 394–95 (Minn. App. 1997) ("[T]he conclusory statements of an expert cannot sustain [plaintiff's] claims."), *review denied* (Minn. June 11, 1997).

Here, the record is devoid of any facts that sustain Lecy's claims. Lecy's continued reliance on the vague assertion that the Dykeses were "good as gold," despite its knowledge that the Dykeses had a questionable credit history, was not reasonable. Accordingly, the district court properly granted summary judgment on Lecy's fraudulent-misrepresentation, negligent-misrepresentation, and promissory-estoppel claims.

C. Negligence Claim

We also conclude that summary judgment was appropriate on Lecy's negligence claim. "The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers*, 539 N.W.2d at 401.

Here, Lecy cannot demonstrate that it was injured by Alliance beyond the $20,000 missing from the closing, damages which Lecy then passed onto the Dykeses. As the district court concluded:

> Lecy bargained for and received a note and mortgage with third priority behind Emigrant and Alliance. . . . [Lecy] subsequently satisfied that note in favor of a second note in a higher amount that included the amount [Lecy] claim[s] to have been shorted at the original closing.

Lecy does not appeal these conclusions. Therefore, we affirm the district court's grant of summary judgment on Lecy's negligence claim.

D. Civil Theft and Conversion

The district court granted Alliance summary judgment on Lecy's claims of civil theft and conversion because Lecy did "not mention Alliance other than in the title, nor [did Lecy] make any allegations against Alliance." Lecy first asserts that the district court's conclusion is erroneous because Lecy's claims met Minnesota's liberal notice-pleading standards by incorporating the previous paragraphs of its complaint into the civil theft and conversion claims. We disagree.

"The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). "While pleadings are to be . . . liberally construed . . . , they must still be framed so as to give fair notice of the claim asserted . . . ." *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 232, 67 N.W.2d 400, 402 (1954).

Lecy's claims for civil theft and conversion make no mention of Alliance. The civil conversion claim states that "Old Republic committed conversion when it willfully interfered with Lecy's personal property (monies due to Lecy from the Emigrant loan and Lecy's lien waivers) through wrongful acts and deprived Lecy of use and possession." Lecy's civil theft claim alleges that:

> Old Republic committed civil theft of approximately $20,000 when it failed to disburse the total amount of funds due to Lecy from the Emigrant loan, and also when it took possession, custody and control of Lecy's lien waivers valued at approximately $2.96 [m]illion [d]ollars from Lecy while knowing it had closing instructions for a $1 Million loan that did not permit any subordinate financing yet at the same time represented that it was also closing on two other loans

> (including the Lecy loan/mortgage) and then failed to record the Lecy mortgage.

Even under liberal pleading standards, Alliance had no notice of why Lecy was asserting these claims against it.

In addition, Lecy argues that the claims of civil theft and conversion "were brought by the parties' consent." To be sure, Alliance "consented" to Lecy's filing of a fifth amended complaint, which contained the claims of civil theft and conversion. But Alliance's consent to the filing of an amended complaint in no way demonstrates that Alliance agreed the additional claims had merit. Thus, the district court properly granted summary judgment in favor of Alliance on these claims.

E. Equitable Subordination

Lecy next challenges the district court's grant of summary judgment on its equitable-subordination claim. As appellant on this issue, Lecy has the burden to demonstrate that the district court erred. *Midway Ctr. Assocs. v. Midway Ctr, Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975).

First, Lecy appears to argue that the district court's initial denial of summary judgment prohibited a subsequent grant of summary judgment. We find this argument unpersuasive because a district court's initial denial of summary judgment does not prevent it from granting summary judgment if a party brings a second motion. *Invest Cast, Inc. v. City of Blaine*, 471 N.W.2d 368, 370 (Minn. App. 1991), *review denied* (Minn. Aug. 1, 1991). The Minnesota Rules of Civil Procedure do not prohibit multiple

summary judgment motions by a single party and specifically allow a motion "at any time." Minn. R. Civ. P. 56.01.

In challenging the district court's order, Lecy also relies on *Citizens State Bank v. Raven Trading Partners*, 786 N.W.2d 274 (Minn. 2010). *Citizens State Bank*, however, does not address an equitable-subordination claim, but rather discusses an equitable-*subrogation* claim. *Id.* at 279–88. Equitable subordination is a bankruptcy law principle under which the court may subordinate a party's claim to the debtor's estate to other claims when that party has engaged in inequitable conduct. *See In re Missionary Baptist Found. of Am.*, 818 F.2d 1135, 1138 (5th Cir. 1987); *see also Black's Law Dictionary* 1563 (9th ed. 2009) (defining subordination as "[t]he act or an instance of moving something (such as a right or claim) to a lower rank"). Equitable subrogation, by contrast, applies "when a person has discharged the debt of another with respect to real property, that person may . . . be substituted in place of a prior encumbrancer and treated as an equitable assignee of the lien." *Citizens State Bank*, 786 N.W.2d at 279 (quotation omitted); *see also Black's Law Dictionary* 1563 (9th ed. 2009) (defining subrogate as "[t]o substitute . . . for another regarding a legal right or claim").

To the extent that Lecy attempts to raise a new argument on appeal, specifically that it is entitled to equitable *subrogation*, it is barred from doing so. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)). Lecy is also barred from raising a new theory, that its equitable-subordination claim is equivalent to an equitable-

subrogation claim, because it failed to raise it before the district court. *Id.* Moreover, Lecy cites no caselaw supporting an argument that equitable-subrogation and equitable-subordination claims are equivalent. By relying on equitable-subrogation caselaw on appeal, Lecy has failed to demonstrate that the district court erred in granting summary judgment on its equitable-subordination claim. Thus, we affirm the district court's grant of summary judgment.

IV. Lecy's Claims Against Old Republic

A. Statute of Limitations

Lecy also appeals the district court's dismissal of its claims against Old Republic. The district court granted summary judgment to Old Republic on all of Lecy's claims because it concluded that the statute of limitations had expired.[13] We review de novo "[w]hether the court erred in applying the law regarding the accrual of the cause of action and the running of the statute of limitations." *Antone*, 720 N.W.2d at 334 (quotation omitted).

Discovery Rule

First, Lecy argues that the district erred by not applying the "discovery rule" to toll the statute of limitations on its fraud claims. For fraud claims, the statute of limitations does not begin to run until "the discovery by the aggrieved party of the facts constituting the fraud." Minn. Stat. § 541.05, subd. 1(6). The plaintiff bears the burden of proving

[13] Lecy asserted the following claims against Old Republic: fraud/misrepresentation, negligent misrepresentation/unjust enrichment, negligence, promissory estoppel, violation of the consumer-fraud act, injunctive relief, breach of fiduciary duty, aiding and abetting, conversion, civil theft, and punitive damages.

that it could not "discover the facts constituting the fraud until within six years before the commencement of the action." *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 684 (Minn. App. 2010). "The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence[,] they could and ought to have been discovered." *Blegen v. Monarch Life Ins. Co.*, 365 N.W.2d 356, 357 (Minn. App. 1985) (quotation omitted). Whether a plaintiff has exercised due diligence is "ordinarily a question of fact," but "[w]here the evidence leaves no room for reasonable minds to differ on the issue . . . the court may properly resolve the issue as a matter of law. *Jane Doe 43C*, 787 N.W.2d at 684–85 (quotations omitted).

Lecy's fraud claim is based on the discrepancy in the funds it received from the Emigrant closing. It is undisputed that Lecy became aware of the alleged discrepancy in funds when Roy Lecy received the check from the closing on the Emigrant note in December 2003.[14] Thus, the issue is whether Lecy exercised reasonable diligence in discovering the fraud after it became aware of the discrepancy.

After Lecy received the check from the Emigrant closing, Roy Lecy contacted the closer, Perusse, to ask about the missing $20,000. Perusse stated that "there was an error in the numbers that Sue Theimer had put together and the numbers are what they were." Lecy did not look into the discrepancy any further, cashed the check, and passed the

[14] Lecy alleges that Old Republic furthered the fraud by not recording the Lecy note until November 2004. *See Davies v. West Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001) ("[T]he final act is used to determine when the statute-of-limitations period begins for the entire course of conduct."), *review denied* (Minn. May 29, 2001). But we see no connection between the discrepancy at the closing on December 24, 2003, and the delay in recording the mortgage.

difference onto the Dykeses. On this record, there is no room for reasonable minds to differ regarding Lecy's lack of diligence. The district court properly concluded that Lecy failed to meet its burden of demonstrating that it exercised due diligence in discovering the fraud. The district court's conclusion that the statute of limitations had run on Lecy's fraud claim is not erroneous.

Fraudulent Concealment

Lecy next contends that the statute of limitations on its non-fraud claims was tolled because Old Republic fraudulently concealed Lecy's potential causes of action. The statute of limitations may be extended if the bad actor fraudulently concealed the cause of action from the aggrieved party. *See Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). "To establish fraudulent concealment, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action, that the statement was known to be false or was made in reckless disregard of its truth or falsity, and that the concealment could not have been discovered by reasonable diligence." *Id*.

Lecy generally claims that "Old Republic made several false statements to conceal a cause of action against it," but does not explain what those false statements were. Because Lecy has not adequately briefed this argument, it is waived. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an argument of error based on "mere assertion" and not supported by argument or authority is waived (quotation omitted)). Moreover, even assuming Old Republic made affirmative statements to conceal any cause of action, as discussed above, Lecy failed to demonstrate

facts that show that it exercised reasonable diligence to discover its claims. Therefore, Lecy's fraudulent-concealment argument fails. *See Haberle*, 480 N.W.2d at 357.[15]

Lecy has failed to demonstrate that a genuine issue of material fact exists regarding concealment. Accordingly, the district court properly concluded that the statute of limitations had expired.

B. Genuine Issues of Material Fact

Lecy next contends that the district court erred in granting summary judgment to Old Republic even though factual disputes existed. It is irrelevant, however, whether disputed facts existed when summary judgment is appropriate as a matter of law. *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) ("A fact is material if its resolution will affect the outcome of a case."). Here, while the district court acknowledged disputed facts in the record, it concluded that they were not material:

> The material facts, and those that support the granting of summary judgment to Old Republic, relate to Old Republic's claim that the statute of limitations bars any of the claims against it. It is clear that Lecy received less than it was supposed to when moneys were disbursed by Old Republic.

Thus, the district court did not err by granting summary judgment.

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[15] Lecy also argues that the delay in discovering its causes of action is excusable because Old Republic had a fiduciary relationship with Lecy. Lecy is correct that "when fraudulent concealment occurs during a fiduciary relationship, the plaintiff need not show affirmative acts of concealment as a prerequisite to following the statute of limitations." *Cohen v. Appert*, 463 N.W.2d 787, 790 (Minn. App. 1990), *review denied* (Minn. Jan. 24, 1991). But a fiduciary relationship does not eliminate a party's burden of demonstrating that the "concealment could not have been discovered sooner by reasonable diligence." *Id.* at 791.

V. Lecy's Claims Against Emigrant

Lecy next contends that the district court erred by dismissing its respondeat-superior claim against Emigrant. Specifically, Lecy claimed that Emigrant is liable "for the intentional acts and wrongdoing committed by . . . Old Republic" under the theory of respondeat superior because Old Republic was Emigrant's agent at the closing.

"Generally speaking, a principal is liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992). A principal cannot be "liable for an unauthorized intentional tort of its agent." *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 615 (Minn. 2012). Therefore, assuming that an agency relationship existed,[16] Emigrant can be held liable for Perusse's alleged fraudulent actions on behalf of Old Republic only if she committed those actions within the scope of the agency relationship.

Lecy's claims are based on the failure of the closer, Perusse, to follow Emigrant's closing instructions and allegations that she helped Theimer steal $20,000 during the Emigrant closing. Because Emigrant hired Old Republic to handle the closing according to its closing instructions, any failure by Perusse to follow Emigrant's instructions is clearly outside the scope of the agency relationship. Additionally, Lecy claims that Perusse and Theimer "conspired to divert the funds to Perusse *personally*," thereby admitting that if Perusse was involved in Theimer's scheme, it was for her own personal

[16] Although the parties dispute whether such a relationship existed, the district court did not address the issue in its order. Given our analysis, we find it unnecessary to do so on appeal.

benefit. Because Perusse's actions were outside the scope of the agency relationship and for her own personal benefit, Emigrant cannot be liable as a matter of law under the theories of agency and respondeat superior. *Semrad*, 493 N.W.2d at 535.

Lecy argues that the district court applied the incorrect standard of law by considering whether Perusse's fraudulent actions were for her own personal benefit. To support this argument, Lecy cites *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905 (Minn. 1999). In *Fahrendorff*, the district court found that because the employee's actions "were prohibited, illegal, and performed for personal gratification, they were not within the scope of his employment." *Id*. at 910. Therefore, the district court dismissed a claim of vicarious liability against the employer. *Id.* at 909. This court affirmed, but the supreme court reversed the district court's decision. *Id.* at 909, 913. The supreme court held that the district court erred in relying on the criminality of, and motivation for, the employee's actions when determining whether the actions were within the scope of an employment relationship. *Id.* at 910–11.

Lecy claims that "[s]ince *Fahrendorff*, the Minnesota Supreme Court has held that it is error for a court to rely on whether an employee acted for personal benefit in determining whether respondeat superior applies." Lecy's reliance on *Fahrendorff* is misplaced because that case addressed respondeat-superior liability in the context of an employer-employee relationship. *Id*. at 911 ("[I]t is a question of fact whether the employee's acts were foreseeable, related to, and connected with acts otherwise within the scope of his employment."). The supreme court's decision in *Semrad v. Edina Realty, Inc.* is more applicable to these facts because it considered an agency relationship.

In *Semrad*, the supreme court stated that a principal may be held liable "for the act of an agent committed in the course and within the scope of the agency and *not for a purpose personal to the agent*." 493 N.W.2d at 535 (emphasis added); *see also Remodeling Dimensions*, 819 N.W.2d at 615 ("[A] principal . . . is not liable for an unauthorized intentional tort of its agent." (citing *Semrad*, 493 N.W.2d at 535)).

Thus, the district court did not err in concluding that Perusse's personal motivation precluded Lecy's claims against Emigrant,[17] and properly granted summary judgment to Emigrant on Lecy's respondeat-superior claim.

VI. Additional Arguments

Lecy and the Dykeses also raise issues about the district court's orders on other motions, specifically discovery motions, motions to compel, motion to set aside stipulations, and a motion to vacate. Because we affirm the district court's summary-judgment orders, we need not address these arguments.

VII. Conclusion

We recognize that summary judgment is a "blunt instrument," and "should be employed only where it is perfectly clear that no issue of fact is involved." *Donnay v. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966). Summary judgment is appropriate, however, when the nonmoving party has failed to "present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. Here, despite

[17] Moreover "a principal can be vicariously liable to a third party for the conduct of its agent *only* if the agent would be liable to the third party for that act." *Remodeling Dimensions*, 819 N.W.2d at 615. Because we affirm the district court's grant of summary judgment in favor of Old Republic, Emigrant is entitled to summary judgment as well.

thousands of documents produced during this lengthy litigation, no genuine issues of material fact exist about either the key circumstances from which this case arose or about the validity of the legal claims that appellants allege.

We are mindful of the consequences that the Dykeses and Lecy have suffered as a result of these unfortunate events and are cognizant of the intentional wrongdoing that occurred during the closing of these loan transactions. Yet the undisputed facts show that appellants' damages are unrelated to Susan Theimer's theft and embezzlement or to any other intentional wrongdoing, and that appellants could not reasonably claim to rely upon any oral representations that Theimer made concerning future loans.

Ultimately, the Dykeses, who are well-educated surgeons who best knew the specifics of their financial situation, chose to assume over $3 million dollars of debt to build a lavish dream home without having a written commitment for permanent financing. And Lecy, an experienced builder in a time of economic boom, chose to finance the dramatically expanded construction project. Despite knowing that no written commitment for permanent financing existed and that a financing issue had developed, Lecy then took on the additional risk of extending a short-term loan to the two surgeons to close on the home. These decisions turned out badly for the Dykeses and Lecy, but nothing in the record before us presents a genuine issue of material fact to show that they could succeed on their legal claims against others. Accordingly, we affirm the district court's grant of summary judgment in favor of Alliance, Old Republic, and Emigrant.

Affirmed.