**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0566**

Kevin S. Carpenter, et al.,
Appellants,

vs.

CitiMortgage, Inc.,
Respondent.

**Filed December 3, 2012**
**Affirmed**
**Peterson, Judge**

Stearns County District Court
File No. 73-CV-10-6460

H.M. Kershner, Pemberton, Sorlie, Rufer & Kershner, PLLP, Fergus Falls, Minnesota; and

Kevin S. Carpenter, Carpenter Injury Law Office, St. Cloud, Minnesota (for appellants)

Jared D. Kemper, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondent)

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

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

**PETERSON**, Judge

On appeal from summary judgment in this mortgage-modification dispute, appellant-mortgagors argue that (1) the record shows fact questions about whether

appellants and respondent-bank entered an enforceable agreement to modify appellants' mortgage, and the district court's ruling to the contrary misapplied the statute of frauds; and (2) the district court erred in failing to grant appellants relief under the theory of equitable estoppel, which was raised for the first time in appellants' request for reconsideration. We affirm.

## FACTS

Appellants Kevin S. and Juliana S. Carpenter borrowed $254,000 from Stearns Bank National Association and signed a note at an interest rate of five percent per year with principal and interest payments of $2,002.62 per month and a maturity date of June 1, 2018. Appellants also executed a mortgage on their Stearns County property as security for the note. Respondent CitiMortgage, Inc., took over servicing of the note and mortgage in 2005.

Appellants failed to make the monthly payments due in March, April, and May of 2009. In their complaint, appellants allege that representatives of respondent contacted appellants and advised them that they might be eligible for a federal mortgage-loan-assistance program. Appellants allege that respondent's representatives stated that, if appellants qualified for the program, appellants would make three monthly trial payments in an amount lower than their monthly mortgage payment and that, after appellants made the trial payments, paperwork would be sent to permanently modify the monthly mortgage amount to the trial-payment amount.

On June 17, 2009, Kevin Carpenter spoke to CitiMortgage employee Tinamarie Claus. Claus's notes from the conversation state: "PASSED FOR MOD

[modification]. . . tld [told] mr [mortgagor] pymt [payment] of $1,517.32 is due by 7/17/09 and ea [each] mnth [month] after that until NEW MOD [modification] DOCS [documents] r [are] rcvd [received] . . . sd [said] ok." Claus's notes also state:

> HMP Incentives Eligibility and Amount
> . . .
> Estimated Loss: ($55,873.62)
> Zero Cure PV Loss: ($71,979.24)
> WA Discounted Payments: ($43,868.77)
> Benefit From Modification: $22,517.38
> . . .
> Modification Terms
> Adjusted Unpaid Principal Balance: $182,507.93
> Principal Forbearance: $0.00
> Citi Proposed Principal Reduction: $0.00
> Initial Modified Interest Rate: 2.000%
> Modified Amortization Term 179
> Amortized Balance: $182,507.93
> Initial Modified P&I Payment: $1,180.08
> Monthly Taxes And Insurance: $337.24
> Approximate Total Payment: $1,517.32

On the same day, respondent wrote appellants a letter that states:

> Your request for a repayment plan has been approved. Your account is now delinquent for the months of 03/01/09 through 06/01/09 for $9,815.16 including $401.72 in late charges, $30.00 in delinquency expenses and $0.00 in other fees.
>
> PLEASE SIGN THE ATTACHED AGREEMENT AS YOUR ACCEPTANCE OF THE PLAN AND RETURN IT TO OUR OFFICE IMMEDIATELY.

The letter states that "[t]he repayment terms of this arrangement are" four payments each in the amount of $1,517.32 due on the 17th of each month from July through October 2009. The letter also states, "All provisions of the Note and the Mortgage/Deed of Trust shall remain in full force and effect."

Appellants signed the agreement and returned it to respondent. Appellants made the first payment on July 15, 2009. Appellants made the second through fourth monthly payments on August 18, September 22, and October 22, 2009.[1] Appellants made two additional payments in the amount of $1,517.32 each on November 25 and December 26, 2009, and then stopped making payments.

Respondent began a foreclosure proceeding, and appellants brought this action against respondent, alleging claims for breach of contract and promissory estoppel. After the district court denied appellants' first summary-judgment motion, the parties filed cross-motions for summary judgment. The district court granted summary judgment for respondent. This appeal followed.

## D E C I S I O N

### I.

Summary judgment is appropriate 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. On appeal from summary judgment, this court reviews de novo whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 18 (Minn. 2009). The evidence is viewed "in the light most favorable to the

[1] Appellants allege that Kevin Carpenter spoke to a representative of respondent, who modified the due dates of the second through fourth payments to September 1, October 1, and November 1, 2009.

party against whom judgment was granted." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 831-32 (Minn. 2012).

Statutory interpretation presents a question of law, which we review de novo. *Halvorson v. City of Anoka*, 780 N.W.2d 385, 389 (Minn. App. 2010). The goals of statutory interpretation are to ascertain and effectuate the legislature's intent. Minn. Stat. § 645.16 (2010). "When the legislature's intent is clearly discernible from a statute's plain and unambiguous language, we interpret the language according to its plain meaning, without resorting to other principles of statutory construction." *Beecroft v. Deutsche Bank Nat'l Trust Co.*, 798 N.W.2d 78, 82-83 (Minn. App. 2011).

Minn. Stat. § 513.33 states:

> Subd. 2. Credit agreements to be in writing. 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.
>
> Subd. 3. Actions not considered agreements. (a) The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2: . . .
>
> (3) the agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements.

The June 17, 2009 agreement that respondent sent to appellants for signature does not refer to a permanent loan modification or state an interest rate and provides for only four reduced payments. Appellants rely on Claus's notes to show that the parties agreed to a permanent loan modification. But even if Claus's notes

were intended to reflect an agreement by respondent to enter into a new credit agreement, the notes were not signed and, thus, fail to meet at least one requirement of the plain and unambiguous language of Minn. Stat. § 513.33, subds. 2, 3(a)(3). *See Greuling v. Wells Fargo Home Mortg., Inc.*, 690 N.W.2d 757, 761-62 (Minn. App. 2005) (upholding summary judgment for mortgagee on promissory-estoppel claim when mortgagor claimed that parties orally agreed to refinancing arrangement and stating that "[t]he plain and unambiguous language of [Minn. Stat. § 513.33, subds. 2, 3(a)(3),] clearly prohibits a claim that a new credit agreement is created unless the agreement is in writing, expresses consideration, sets forth all relevant terms and conditions, and is signed by the creditor and the debtor"). And Claus's notes were not incorporated into the June 17 agreement. To the contrary, appellants' interpretation of the notes contradicts the statement in the June 17 agreement that "[a]ll provisions of the Note and the Mortgage/Deed of Trust shall remain in full force and effect."

Appellants contend that they met the requirements for modification of their mortgage under a federal mortgage-loan-assistance program. But appellants state in their brief that "[respondent] has repeatedly asserted that [appellants] cannot make a claim based upon alleged violations of [the federal mortgage-loan-assistance program], and [appellants] have repeatedly den[ied] making such a claim." As appellants concede, this is an action for breach of contract, not an action for violation of the federal mortgage-loan-assistance program.

The district court properly granted summary judgment for respondent on appellants' breach-of-contract claim.

**II.**

Appellants asserted an equitable-estoppel theory for the first time in a letter to the district court requesting reconsideration. "Motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances." Minn. R. Gen. Pract. 115.11.

In the letter requesting reconsideration, appellants stated:

> In the original Complaint, we asked for judgment "Awarding whatever further relief the Court deems to be just and appropriate under the circumstances." This was *intended* to include equitable estoppel.

"Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." *Hansen v. Robert Half Intern., Inc.*, 813 N.W.2d 906, 917-18 (Minn. 2012) (holding that amended complaint that stated claim for violation of parenting-leave act was insufficient to put opposing party on notice of retaliation claim). "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." *Goeb v. Tharaldson*, 615 N.W.2d 800, 818 (Minn. 2000). Consistent with this purpose, parties are allowed to amend pleadings freely "when justice so requires." Minn. R. Civ. P. 15.01. But a party that "fails to take advantage of this procedure . . . is bound by the pleadings unless the other issues are

litigated by consent." *Roberge v. Cambridge Co-op. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954).

Appellants' statement in the complaint requesting judgment "[a]warding whatever further relief the Court deems to be just and appropriate under the circumstances" was insufficient to put respondent on notice that appellants intended to seek relief under the theory of equitable estoppel. Because appellants identified no compelling circumstances to excuse their failure to raise the theory at an earlier stage in the proceeding, the district court properly denied their reconsideration request.

**Affirmed.**