STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0925

MidCountry Bank,
Respondent,

vs.

Harlan Anderson, et al.,
Appellants.

Filed December 23, 2013
Affirmed
Bjorkman, Judge

Wright County District Court
File No. 86-CV-12-716

Dustan J. Cross, Justin P. Weinberg, Gislason & Hunter, LLP, New Ulm, Minnesota (for respondent)

Larry J. Peterson, Krista L. Hiner, Peterson, Logren & Kilbury, P.A., St. Paul, Minnesota (for appellants)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellants challenge the district court's dismissal of their counterclaims in this foreclosure action, arguing that (1) the district court erred by concluding that two of the

counterclaims are based on federal laws that do not apply in this case and (2) material fact issues preclude summary judgment as to the remaining counterclaims. We affirm.

FACTS

Appellants Harlan Anderson and Mary Anderson own 500 acres of land in Wright County, which they have farmed for more than 40 years. They currently use the land for crop farming and manufacturing a cubed-hay product that they sell to the horse industry "mainly on a research basis." The Andersons have historically funded their farming operations in part with loans secured by a variety of machinery and equipment and operating notes. They began banking with respondent MidCountry Bank in the late 1990s when their loan officer, David Larson, left another bank and began working for MidCountry. MidCountry loan officer David Resch took over their loan portfolio when Larson left MidCountry at the end of 2009.

Some of the loans MidCountry extended to the Andersons were guaranteed by the United States Department of Agriculture's (USDA) Farm Services Agency (FSA). Those loans matured or had principal payments due on April 1, 2009. Larson assigned to Resch the responsibility of preparing an application to renew the loan guarantee, which Resch submitted to the FSA on March 31, 2009. The application sought a 90% guarantee of a loan in the amount of $1,094,000, and proposed as security the Andersons' grain inventory valued at $1,267,325, machinery valued at $635,400, cubing equipment valued at $674,500, and real estate (the "Martin" farm) valued at $300,000. The FSA subsequently informed MidCountry that it would guarantee the loan if the Andersons provided additional security in the form of more than $2.8 million in real estate located in

Cokato Township. The Andersons were unwilling to include any of their Cokato Township land or the cubing equipment as collateral. Consequently, MidCountry did not pursue the FSA loan guarantee further.

During the summer of 2009, MidCountry discussed with the Andersons the possibility of obtaining a loan guarantee from the Small Business Administration (SBA). But after reviewing the Andersons' hay-cubing operation, MidCountry determined that this venture and the scope of the desired financing did not meet its underwriting standards and decided not to proceed with an SBA loan-guarantee application.

Instead, MidCountry proposed seeking a Business and Industrial (B&I) loan guarantee through the USDA's Rural Development Program. MidCountry applied for a 80% guarantee for two $450,000 loans, which Rural Development approved on December 23, 2009. The Andersons and MidCountry closed on the B&I loans on March 9, 2010. Later that month, MidCountry extended to the Andersons a $280,000 loan payable on demand but not later than the end of that year. And on August 6, MidCountry provided the Andersons a $190,000 three-year loan for construction of a barn.

In January 2011, the Andersons requested additional financing to purchase two $60,000 stand mixers for use in their hay-cubing business. After initial discussions, the Andersons believed MidCountry would finance the full cost of the mixers. But MidCountry ultimately agreed to finance only 70% of the purchase price ($42,000) and required security interests in the mixers, the Andersons' nonconsumer personal property, and their 2011 crops.

The Andersons were approached by a broker in the spring of 2011 about marketing their cubed-hay product. To obtain new working capital, Harlan Anderson contacted MidCountry. When he received no response to his request for a line of credit, he decided not to make the April payment on the Andersons' outstanding loans to get MidCountry's attention. Shortly thereafter, he met with Resch and two MidCountry corporate officers to discuss the four past-due loans, an unpaid fifth loan that had matured on April 15, and prospects for future financing.

Resch sent the Andersons a "follow-up" letter on May 3. Resch explained that MidCountry would waive the late charges for all five loans, renew the recently matured loan for three years, and provide additional financing for crop inputs and short-term marketing expenses if the Andersons would bring all past-due loans current and pay the outstanding balance on the matured loan. The letter stated that MidCountry was otherwise "not interested in granting any additional financing" for the cubed-hay operation. MidCountry gave the Andersons until May 9 to respond to its offer.

On May 6, Harlan Anderson wrote to MidCountry requesting a $500,000 ongoing line of credit, an additional $50,000 loan for marketing expenses, and a farm operating loan of $250,000. He also asked MidCountry to renew the matured loan for a new five-year term. He did not address the past-due notes. MidCountry declined Harlan Anderson's requests and extended the deadline of its prior offer to May 16. The Andersons did not meet this deadline.

MidCountry subsequently commenced this foreclosure action.[1] The Andersons answered and asserted six counterclaims: (I) breach of fiduciary duty; (II) interference with prospective advantage; (III) public disclosure of private facts; (IV) negligent misrepresentation; (V) failure to follow procedures under the Farm Credit Act; and (VI) failure to follow procedures under the B&I Loan Program. MidCountry moved to dismiss counterclaims V and VI, which the district court granted. MidCountry subsequently moved for summary judgment on its foreclosure claim and the Andersons' remaining counterclaims. The district court granted summary judgment in MidCountry's favor in all respects. This appeal follows.

D E C I S I O N

I. The Andersons are not entitled to relief on counterclaims V and VI.

When reviewing a district court's Minn. R. Civ. P. 12.02(e) dismissal of a case for failure to state a claim upon which relief can be granted, the question before us is whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). We consider "only the facts alleged in the complaint, accepting those facts as true," and our standard of review is de novo. *Id.*

A. Counterclaim V: Failure to follow Farm Credit Act procedures

The Andersons allege that MidCountry failed to comply with the Farm Credit Act because it did not provide them notice that their distressed loan may be suitable for restructuring, as required under 12 U.S.C. § 2202a(b) (2012).[2] We agree with the district

[1] The action originally sought foreclosure on four notes. The Andersons paid the balance on three of the notes, leaving only a claim as to one of the B&I loans.

court that the Andersons do not state an actionable claim against MidCountry for violation of this requirement.

The restructuring notice requirement applies only to "qualified lenders." *See* 12 U.S.C. § 2202a(b). A qualified lender is

> (A) a System institution that makes loans (as defined in paragraph 5) except a bank for cooperatives; and
> (B) each bank, institution, corporation, company, union, and association described in section 2015(b)(1)(B) of this title but only with respect to loans discounted or pledged under section 2015(b)(1) of this title.

12 U.S.C. § 2202a(a)(6) (2012). It is undisputed that MidCountry, a federal savings bank, is not a "system institution" under provision (A). But the Andersons contend provision (B) applies because MidCountry is a "bank, institution, corporation, company, credit union, and association described in section 2015(b)(1)(B)." We disagree. Provision (B) requires that the loan at issue was "discounted or pledged under section 2015(b)(1)," which means "discounted or pledged" by a Farm Credit Bank. *See* 12 U.S.C. § 2015(b)(1) (2012). The Andersons concede that their loan was not discounted or pledged by a Farm Credit Bank. MidCountry therefore is not a qualified lender subject to the restructuring notice requirement. Because the Andersons do not have an actionable claim under the Farm Credit Act, counterclaim V fails as a matter of law.[3]

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[2] The Andersons cite to regulations 12 C.F.R. §§ 617.7000, .7410(a) (2013). Because these regulations merely restate the statutory requirements and definitions, we cite the relevant sections of the United States Code instead.

[3] Because the inapplicability of the Farm Credit Act independently justifies dismissal of the counterclaim, we decline to address the district court's alternative conclusion that the restructuring notice requirement does not give rise to a private cause of action.

B. Counterclaim VI: Failure to follow B&I Loan Program procedures

The Andersons allege that they are entitled to recover damages because MidCountry did not obtain written approval of the B&I administering agency before altering any loan instruments or commencing collection and foreclosure actions, as required under 7 C.F.R. § 4287.124 (2013) (precluding lender from altering or approving alteration of "any loan instrument without the prior written approval of the Agency"). No Minnesota court has recognized a private cause of action for violation of this regulation. And this regulation plainly addresses a lender's obligations to the USDA when it guarantees the lender's loan to a farmer-borrower. *See* 7 C.F.R. § 4279.2(a) (2013) (defining "Agency" as "[t]he Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the B&I program"). As such, the regulation does not affect the lender's obligations to the borrower or even necessarily protect the borrower. Because nothing in the regulation creates or implies a cause of action in the borrower for noncompliance, we conclude that counterclaim VI fails as a matter of law.

II. MidCountry is entitled to summary judgment dismissing the other counterclaims.

Summary judgment is appropriate when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, we review de novo whether there are genuine issues of material fact and whether the district court correctly applied the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). In doing so, we view the evidence "in the light most

favorable to the party against whom summary judgment was granted."[4] *McKee v. Laurion*, 825 N.W.2d 725, 729 (Minn. 2013). But "when the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). The nonmoving party must do more than rest on mere averments and must create more than a mere metaphysical doubt regarding an essential element. *Id.* A complete lack of proof of any essential element supports summary judgment. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

A. Counterclaim I: Breach of fiduciary duty

To recover for breach of fiduciary duties, a claimant must establish that a fiduciary relationship existed and that the fiduciary breached a duty arising from that relationship. *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009), *review denied* (Minn. July 22, 2009). The duties arising from a fiduciary relationship are often described as duties of care, good faith, and candor. *Potter v. Pohlad*, 560 N.W.2d 389, 392 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). The district court did not expressly determine whether the parties had a fiduciary relationship, noting only that "the Andersons' relationship with [MidCountry] transcends a typical customer/bank relationship." But the court concluded that there is no evidence that MidCountry

[4] The Andersons contend that the district court failed to view the record in the light most favorable to their claims and therefore erred in determining that there are no genuine fact issues for trial. In light of our de novo standard of review, this contention does not warrant separate analysis.

breached any duties to the Andersons. Assuming the existence of a fiduciary relationship, we address each of the six alleged breaches in turn.

First, the Andersons allege that MidCountry breached a fiduciary duty by delaying the submission of their 2009 loan-guarantee application to FSA and by altering the application without their permission. The application and Resch's correspondence with the FSA indicate that MidCountry submitted the application one day before the deadline and the FSA timely received the application. The evidence also demonstrates that the FSA responded with a conditional commitment that required additional real estate (the Cokato Township land) as collateral; that the FSA later agreed to reduce the additional collateral requirement to "only a lien on 320 acres of the Cokato Township land"; and that Resch communicated the 320-acre requirement to the Andersons. The Andersons rejected the FSA's proposal and indicated that they would have refused the security terms included in the original application (despite having signed it) because they did not want the cubing equipment included as security.

The Andersons assert that Harlan Anderson's deposition testimony creates a fact issue as to whether MidCountry or the FSA added the Cokato Township land to the collateral being considered for the loan. We disagree. Harlan Anderson testified that he believed someone from MidCountry must have altered the loan application that he signed (but did not read) to include the Cokato Township land because (1) the Andersons had a long-term understanding with Larson that they would not put up real estate as collateral and (2) Larson denied Harlan Anderson's request to resubmit the original loan-guarantee application because Larson was concerned about imperiling MidCountry's chances of

obtaining FSA guarantees in the future.[5] This self-serving speculation does not create a fact issue sufficient to withstand summary judgment, particularly in light of the clear documentary evidence that it was the FSA that added the Cokato Township land to the collateral listed in the loan-guarantee application. *See Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995) (holding that speculation is insufficient to create a genuine issue of material fact); *Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009) (stating that a "self-serving affidavit that contradicts other testimony is not sufficient to create a genuine issue of material fact" or satisfy burden of proof), *review denied* (Minn. Mar. 17, 2009).

Second, the Andersons contend that MidCountry breached a fiduciary duty by failing to apply for an SBA loan guarantee. The undisputed evidence indicates that MidCountry did not seek a guarantee because it decided not to loan the Andersons money for the hay-cubing business after determining that the business did not have a "solid marketing plan," signed contracts, sufficient liquidity, or any cash flow. The Andersons do not dispute that they lacked both contracts and cash flow from their cubed-hay business at that time. Nonetheless, they assert that there is a fact issue as to whether MidCountry breached its duty to clarify previously disclosed information, namely MidCountry's previous verbal approval of the loan and statements that the SBA loan would resolve all their financial worries. We disagree. Oral statements cannot establish

[5] The Andersons also assert that this refusal to resubmit the application deprived them of an opportunity to appeal the anticipated denial of the loan-guarantee application. But we observe that only MidCountry, as the applicant, would have been entitled to appeal the denial.

entitlement to a loan. *See* Minn. Stat. § 513.33, subds. 2-3 (2012) (requiring writing to establish new credit agreement).[6] And the undisputed evidence indicates that MidCountry *did* clarify previous assurances that a loan application likely would be successful when investigation revealed that it was unlikely to be.

Third, the Andersons allege that MidCountry breached a fiduciary duty by failing to timely advise them of its October 2009 decision not to lend them any "new" money, which prevented them from obtaining loans from another financial institution. This contention lacks evidentiary support. The Andersons have repeatedly acknowledged that they knew MidCountry was seeking to limit its involvement with agricultural loans, they had opportunities to proceed with other financial institutions, and they declined to do so. Moreover, the Andersons' claim that MidCountry determined not to lend them new money is belied by the undisputed evidence that MidCountry extended them additional financing multiple times in 2010.

Fourth, the Andersons assert that MidCountry breached a fiduciary duty by delaying the submission of the B&I loan-guarantee application. This assertion is based solely on a misstatement in MidCountry's briefing to the district court and lacks any

[6] MidCountry seeks to use Minn. Stat. § 513.33 as a shield against virtually all of the Andersons' fiduciary-duty claims. However, most of the breaches of fiduciary duty that the Andersons allege do not involve a claim that they are entitled to a new loan. *See* Minn. Stat. § 513.33, subd. 3(a) (listing actions that "do not give rise to a claim *that a new credit agreement is created*, unless the agreement satisfies the requirements of subdivision 2" (emphasis added)). On the other hand, the Andersons' argument that Minn. Stat. § 513.33 never applies in the context of fiduciary relationships is refuted by the express terms of the statute, which envision the creation of credit agreements within a fiduciary relationship. *See id.*, subd. 3(b) ("A credit agreement may not be implied from the relationship, fiduciary or otherwise, of the creditor and the debtor.").

foundation in the record. Rather, the undisputed evidence indicates that MidCountry sent a pre-application to Rural Development in August 2009; MidCountry heard in September that the pre-application looked promising but required several issues to be addressed; MidCountry submitted an application sometime before November 9; and Rural Development approved the loan guarantees on December 23.

Fifth, the Andersons allege that MidCountry breached a fiduciary duty by cross-collateralizing their B&I loans without their approval. The undisputed evidence defeats this claim. MidCountry made two separate B&I guaranteed loans, as the Andersons requested—one for machinery and equipment and one for working capital. But Harlan Anderson acknowledged that no MidCountry representatives told the Andersons that the B&I loans would not be cross-collateralized. To the contrary, the conditional commitment and the security agreements for the B&I loans, all of which the Andersons signed, plainly indicate that the same collateral would serve for both loans. The Andersons did not read those documents. While a fiduciary "may have an expanded obligation to inform the beneficiary of the legal implications of their dealings," *Brekke v. THM Biomed., Inc.*, 683 N.W.2d 771, 778 (Minn. 2004), a fiduciary may still expect that an individual will read a legally binding contract before signing it, particularly when the individual is experienced in such matters. *Midland Nat'l Bank v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980); *see also Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn. 1982) ("In the absence of fraud or misrepresentation, a person who signs a contract may not avoid it on the ground that he did not read it or thought its terms to be different.").

Sixth, the Andersons allege that MidCountry breached a fiduciary duty by loaning them only $42,000 to purchase the stand mixers in January 2011, rather than the $60,000 they had been led to expect, and taking a lien against their 2011 crop as collateral without specifically advising them that it was going to do so. The first aspect of this claim fails because any alleged oral promise of a loan cannot establish entitlement to such a loan or damages for failure to deliver it. *See* Minn. Stat. § 513.33, subds. 2-3; *Becker v. First Am. State Bank*, 420 N.W.2d 239, 240-41 (Minn. App. 1988) (precluding finding of damages based on oral credit promise). And the second aspect of this claim fails because the plain language of the security agreement expressly includes "[a]ll crops growing or to be grown in crop year 2011."

In sum, we conclude that no material fact issues exist as to any of the alleged breaches of fiduciary duty. Absent evidence of breach, the Andersons cannot prevail on counterclaim I, and MidCountry is entitled to judgment as a matter of law.

B. Counterclaim II: Tortious interference with prospective advantage

A claim of tortious interference with prospective advantage requires proof that the defendant "intentionally and improperly" interfered with the plaintiff's prospective contractual relation by either "(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982) (quotation omitted).

A broker told the Andersons in early 2011 that he would market their cubed-hay product to three companies and expected to achieve sales of over $1,000,000. The

Andersons allege that MidCountry interfered with this prospective contractual relationship by refusing to provide them assurances of financing for the cubed-hay operation. We disagree. First, there is no evidence that MidCountry was under any obligation to assure the Andersons that they would receive financing or that it otherwise acted "improperly" by failing or refusing to provide the requested assurances. Second, there is no record evidence that MidCountry's failure to provide assurances of financing deprived the Andersons of any prospective contractual relation. The Andersons were concerned, absent assurances from MidCountry, that they were not financially secure enough to satisfy any contracts the broker might acquire for them. Accordingly, they chose not to retain the broker. The Andersons' decision prevented them from entering into the contracts the broker anticipated. This evidence does not establish a fact question as to the availability of any prospective advantage with which MidCountry could be found to have interfered.

The Andersons also contend that MidCountry interfered with their relationships with the FSA and the SBA and "derailed" their attempts to explore and secure financing elsewhere. These claims rest on the same allegations as their parallel breach-of-fiduciary-duty claims, which lack any evidentiary foundation, as we discussed above. On this record, we conclude that MidCountry is entitled to summary judgment in its favor on this counterclaim.

C. Counterclaim III: Publication of private facts

To state a claim for publication of private facts, a plaintiff must demonstrate that (1) the defendant gave publicity to a matter concerning the private life of another, (2) the

matter publicized is of a kind that "would be highly offensive to a reasonable person," and (3) the matter publicized is "not of legitimate concern to the public." *Bodah*, 663 N.W.2d at 553 (quotations omitted). For purposes of this tort, publicity entails more than mere communication to another "or even to a small group of persons." *Id.* at 554 (quotation omitted). Instead, it "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* at 553-54, 557 (quotation omitted) (distinguishing publicity element in publication-of-private-facts action from publication element in defamation action).

The Andersons allege that MidCountry "publicized confidential loan and credit information" about them "to other individuals and the general public." The only evidence they cite is Harlan Anderson's testimony that seven individuals asked him about "problems" with his bank. We agree with the district court that disclosure to seven individuals is insufficient to establish the requisite publicity element of this tort. *Cf. id.* at 557-58 (concluding that a trucking company's dissemination of 204 employees' social security numbers to 16 terminal managers did not meet the publicity requirement). Moreover, the Andersons have not presented any evidence that the individuals who referenced their "problems" with MidCountry had any knowledge of the Andersons' matters, let alone their "confidential loan and credit information," or that any such information came from MidCountry. And we are not persuaded that the additional time for discovery on this claim that the Andersons sought would have been anything other than a "fishing expedition." *See Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231

(Minn. App. 2006) (quotation omitted). On this record, MidCountry is entitled to summary judgment on the Andersons' publication-of-private-facts counterclaim.

D. Counterclaim IV: Negligent misrepresentation

To prevail on a negligent-misrepresentation claim, the plaintiff must establish that (1) the defendant owed the plaintiff a duty of care; (2) the defendant supplied false information to the plaintiff; (3) the defendant failed to exercise reasonable care in communicating the information; and (4) the plaintiff justifiably relied on the false information. *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012). The Andersons allege that MidCountry negligently misrepresented (1) the collateral necessary for the mixer loan and (2) the extent of financing available for the purchase of the stand mixers. Neither allegation has evidentiary support. First, as we discussed in the context of the fiduciary-duty claim, there is no evidence that MidCountry misrepresented to the Andersons the collateral necessary for the mixer loan. The security agreement, which the Andersons signed, plainly identifies the 2011 crops as collateral. Second, the Andersons' contention that MidCountry negligently misrepresented the amount of money it was willing to loan them to purchase the mixers is essentially a claim that they were entitled to a loan for $60,000 based on statements made by MidCountry's representatives. Because this claim is contrary to the subsequent unambiguous written loan contract, it is barred by Minn. Stat. § 513.33, subds. 2-3, and the parol evidence rule.[7] *See Alpha Real*

[7] The Andersons' brief references several other acts or statements that they assert constitute negligent misrepresentation. But the Andersons did not clearly reference any of these acts or statements in their submissions to the district court, so the district court did not address them. Consequently, those issues are not properly before us as a basis for

Estate Co. of Rochester v. Delta Dental Plan of Minn., 664 N.W.2d 303, 312 (Minn. 2003). Accordingly, we conclude that MidCountry is entitled to summary judgment on the Andersons' negligent-misrepresentation counterclaim.

Affirmed.

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overturning the district court's grant of summary judgment. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988) (limiting appellate review to matters presented to and considered by district court).