STATE OF MINNESOTA
IN COURT OF APPEALS
A09-988

Home Federal Savings Bank,
Respondent,

vs.

Blaine Hospitality, LLC, et al.,
Appellants,
Bjorn Kaashagen, et al.,
Defendants,

vs.

Bjorn Kaashagen,
Cross-Claimant,

vs.

BJK Construction, Inc. f/k/a Kaashagen & Sons, Inc.,
Third Party Defendant.

Filed April 6, 2010
Affirmed
Stauber, Judge

Anoka County District Court
File No. 02CV082514

George R. Serdar, Michelle R. Jester, Messerli & Kramer, P.A., Minneapolis, Minnesota (for respondent)

Kelley R. Lorix, Patrick C. Summers, Mackall, Crounse & Moore, P.L.C., Minneapolis, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal in this mortgage-foreclosure dispute, appellants argue that the district court erred in granting summary judgment to respondent bank and abused its discretion in appointing a receiver. We affirm.

FACTS

In June 2005, respondent Home Federal Savings Bank agreed to lend appellant real-estate-development company, Blaine Hospitality, LLC, five million dollars for the construction of a hotel on a parcel of real property in Blaine. At the closing on the loan, Blaine Hospitality executed a five million dollar promissory note in favor of Home Federal, secured by a mortgage on the real property. Six individuals also executed personal guarantees on behalf of Blaine Hospitality. The terms of the note and mortgage are governed by a loan agreement between the parties.

Blaine Hospitality, Home Federal, and Rochester Title Company also entered into a construction loan disbursement agreement that established the procedure for distribution of loan proceeds. Under the terms of the agreement, the loan proceeds were to be distributed by Rochester Title. Prior to each disbursement, Rochester Title was to obtain (1) a "Sworn Construction Statement setting forth the contractors and material supplies with whom contracts have been entered into, the amount of each contract, the amount paid-to-date, the amount being requested, and the balances due"; (2) a draw

request signed by Blaine Hospitality for the requested disbursement; (3) approval of the draw request from Home Federal along with written instructions to disburse the advance; and (4) "[u]nconditional, partial, up-to-date lien waivers, plus affidavits, supporting invoices or substantiated evidence of payment, lien waivers and releases of liens, if necessary, satisfactory to [Rochester Title]." Upon receiving the advance funds from Home Federal, Rochester Title was required to "disburse [the funds] directly to the general contractor and sub-contractors and other part[ies] identified in the relevant draw request, or, at the discretion of [Rochester Title] directly to the general contractor."

At the loan closing, appellant William Folkert, the managing partner of Blaine Hospitality, purportedly requested that Rochester Title issue disbursements directly to the subcontractors to ensure that they would be paid. BJK Construction (BJK), the general contractor for the project, objected to the request, arguing that direct payments to the subcontractors would be "too cumbersome." To alleviate Folkert's concerns about the payment process, Douglas Amundson, the vice-president of business banking for Home Federal, and Paula Bauer, a representative from Rochester Title, allegedly made oral promises to Folkert that loan funds would not be released to BJK without first receiving lien waivers from the subcontractors.

Construction on the project commenced in August 2005. In May 2006, Blaine Hospitality discovered that some of the subcontractors were not being paid for their work on the project. After further investigation, Blaine Hospitality determined that BJK had been receiving disbursements from Rochester Title but had failed to forward the amounts owed to subcontractors as represented in the draw requests. Blaine Hospitality also

learned that Rochester Title had not obtained lien waivers from each of the subcontractors before disbursing the funds to BJK.

The failure to pay subcontractors and obtain lien waivers resulted in significant cost overruns because the balances owed to the subcontractors remained outstanding. Nine mechanic's liens were also filed against the property. The filing of mechanic's liens against the property constituted a default under the terms of the loan agreement and mortgage.

As a result of these issues, Home Federal refused to make further disbursements until the amounts owed to the subcontractors and the amount necessary to complete the project were determined. On July 7, 2006, Blaine Hospitality and the guarantors (appellants[1]) executed an acknowledgment and reaffirmation agreement, which included a provision that required appellants to deposit $300,000 with Home Federal before Home Federal would continue to honor draw requests.

After appellants deposited the funds necessary under the agreement, Home Federal continued to demand additional funds before making disbursements. Home Federal's demands led to protracted negotiations over the amount to be contributed by appellants and caused significant construction delays as subcontractors waited for payment advances before continuing their work. To obtain the funds necessary to satisfy Home Federal's demands, appellants were forced to borrow approximately $800,000 from First Integrity Bank. The loan was secured by a second mortgage on the property recorded in

[1] The term "appellants" refers to Blaine Hospitality and each of the guarantors besides Bjorn Kaashagen. Kaashagen was a member of Blaine Hospitality, a principal and chief operating officer of BJK, and a personal guarantor of the loan.

November 2006. Home Federal's written consent was not obtained before the mortgage was placed on the property. Blaine Hospitality's failure to obtain prior written consent constituted yet another default under the loan agreement and mortgage. Construction eventually resumed, and the hotel opened in June 2007, over one year later than originally anticipated.

On September 4, 2007, Home Federal sent appellants notice of default on additional obligations under the loan agreement. But Home Federal agreed to forbear exercising its rights and remedies for the defaults until April 10, 2008, so long as appellants complied with certain conditions and avoided further defaults.

Appellants subsequently defaulted on other loan conditions, including failing to make payments due under the note and neglecting to deposit monthly maintenance reserves into escrow. As a result, Home Federal commenced this breach-of-contract action to collect the debt owed on the note, to establish the priority of and foreclose its mortgage, and to enforce the individual guaranties. Appellants admitted that they had defaulted on some of the terms of the loan agreement, but argued that Home Federal's claims were barred by estoppel and waiver. Blaine Hospitality and appellants brought counterclaims against Home Federal, a cross-claim against defendant Bjorn Kaashagen, the chief operating officer of BJK and a personal guarantor of the loan, and a third-party claim against BJK. Rochester Title was not made a party to the dispute.

Home Federal later moved for summary judgment on its claims against appellants and default judgment against Kaashagen. Home Federal cited four specific defaults under the loan documents to support its motion, including: (1) failing to make full

payments of principal and interest due under the note; (2) failing to satisfy the mechanic's liens against the property; (3) allowing subordinate liens to be placed against the property; and (4) failing to deposit maintenance reserve payments in escrow.

The district court granted the motions, awarded judgment against each of the appellants for the outstanding principal amount of the loan, interest, fees, and costs; entered a judgment of foreclosure; ordered the foreclosure sale of the property; and, in a separate order, appointed a receiver. This appeal followed.

D E C I S I O N

I.

When reviewing a grant of summary judgment, we determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). 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 of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). Whether a genuine issue of material fact exists and whether the district court erred in its application of the law is reviewed de novo. *Id.* at 77.

Appellants admit that they defaulted on the loan conditions cited by Home Federal in support of its summary judgment motion. But they claim that the district court erred in

granting summary judgment because they raised valid affirmative defenses to each of the defaults. Each purported defense is addressed below.

A. Equitable estoppel

First, appellants argue that Home Federal should be precluded from pursuing its rights and remedies for their defaults based on the doctrine of equitable estoppel. Appellants contend that equitable estoppel applies because Douglas Amundson, the vice-president of business banking for Home Federal, allegedly made an oral promise to William Folkert, the managing partner of Blaine Hospitality, that Home Federal would not allow disbursements to be made without mechanic's lien waivers from the subcontractors.

> The doctrine of [equitable estoppel] is founded in justice and good conscience and is a favorite of the law. It arises when one, by his acts or representations, or by his silence when he ought to speak, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced in such manner that if the former is permitted to deny the existence of such facts, it will prejudice the latter.

In re Estate of Peterson, 203 Minn. 337, 343, 281 N.W. 275, 278 (1938).

Equitable estoppel may bar a litigant from denying the truth of representations of fact previously made when the following requirements are met:

> (1) [t]here must be a misrepresentation of a material fact;
> (2) [t]he party to be estopped must be shown to have known that the representation was false;
> (3) [t]he party to be estopped must have intended that the representation be acted upon;
> (4) [t]he party asserting the estoppel must not have had knowledge of the true facts; and

> (5) [t]he party asserting the estoppel must have relied upon the misrepresentation to his detriment.

Transamerica Ins. Group v. Paul, 267 N.W.2d 180, 183 (Minn. 1978).

"This court determines de novo whether equitable estoppel applies to a party's conduct." *Lucio v. Sch. Bd. of Indep. Sch. Dist. No. 625*, 574 N.W.2d 737, 740 (Minn. App. 1998), *review denied* (Minn. Apr. 30, 1998).

Here, the district court found that, despite Amundson's alleged oral representation, appellants should have known that Rochester Title, rather than Home Federal, was responsible for obtaining the lien waivers based on the express language of the loan disbursement agreement. Thus, the court concluded that there was no genuine issue of material fact as to the fourth element of equitable estoppel because appellants were aware of the "true fact" that Rochester Title was responsible for obtaining lien waivers. The court further held that, even if Amundson's statement did create a genuine issue of material fact, the statement was barred by the parol-evidence rule.

We agree with the district court's reasoning. Appellants are charged with knowledge of Rochester Title's responsibility for the lien waivers because Blaine Hospitality, one of the appellants, is a signatory to the loan disbursement agreement and is therefore charged with knowledge of its contents. Further, any evidence of Amundson's purported oral representations is barred by the parol-evidence rule. The parol-evidence rule excludes evidence outside the written agreement, including oral discussions before or contemporaneous with the execution of the agreement, if the evidence contradicts the plain terms of the agreement. *Material Movers, Inc. v. Hill*, 316

N.W.2d 13, 17 (Minn. 1982). Here, it is undisputed that Rochester Title was responsible for securing the lien waivers under the terms of the loan disbursement agreement. The agreement also contains an integration or merger clause indicating that the agreement can "be amended or modified only by a written amendment signed by the parties." Once a contract is considered integrated, parol evidence cannot be used to vary the terms of the contract. *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121, 123 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989). Accordingly, evidence that Amundson orally promised that Home Federal would ensure that the lien waivers were obtained is barred by the parol evidence rule because it contradicts the plain language of the integrated loan disbursement agreement, which made Rochester Title responsible for obtaining the lien waivers.

B. Agency

Next, appellants assert that Home Federal is precluded from enforcing the loan defaults because Rochester Title is Home Federal's agent for purposes of obtaining the lien waivers. "Agency is the fiduciary relationship that results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). "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).

To support a finding of agency, two elements must be satisfied. *Teeman v. Jurek*, 312 Minn. 292, 299, 251 N.W.2d 698, 702 (1977). First, it must be shown that there is a manifestation by the principal that an agent act on behalf of the principal. *Id.* Second, it must be shown that the principal has a right of control over the agent for purposes of the undertaking. *Id.* The party alleging the existence of the agency has the burden of proof. *White v. Boucher*, 322 N.W.2d 560, 566 (Minn. 1982). "Whether an agency relationship exists is generally a question of fact unless the evidence is conclusive one way or the other." *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 423 (Minn. App. 2000).

The district court found that no genuine issues of material fact existed as to whether Rochester Title was Home Federal's agent for purposes of securing the lien waivers. The court focused on the second element for establishing agency, concluding that appellants failed to present any evidence that Home Federal had control over Rochester Title in ensuring that proper lien waivers were in place prior to the disbursements.[2]

We agree with the district court's determination. Even if we were to assume that Rochester Title was acting on behalf of Home Federal in obtaining lien waivers from subcontractors, appellants have failed to present any evidence that Home Federal had control over Rochester Title in ensuring that proper lien waivers were in place prior to the disbursements. In fact, for reasons not clear on this record, the terms of the disbursement agreement grant Rochester Title independent authority over this process. Without any

[2] Title companies customarily serve lenders in various capacities; to establish primary mortgage lien priority, disburse loan proceeds in a manner as to preclude subsequent liens (usually mechanic's liens), and ultimately provide a lender's policy of title insurance.

evidence in the record to establish the second element of agency, the district court did not err in rejecting this defense.

C. Waiver

The district court also found that summary judgment was appropriate because appellants defaulted on the terms of the loan agreement and mortgage by failing to obtain Home Federal's written consent before allowing First Integrity to place a second mortgage on the property. The loan agreement and mortgage prohibit appellants from placing subordinate liens on the property without the prior written consent of Home Federal.

Appellants assert that Home Federal waived this condition because it had actual notice of the subordinate lien and did not object to it. "Waiver is the voluntary and intentional relinquishment of a known right," and to establish waiver there must be evidence that the possessor of the right knew of the right and intended to waive it. *Ill. Farmers Ins. Co. v. Glass Serv. Co*., 683 N.W.2d 792, 798 (Minn. 2004). Waiver can be established through conduct or by inaction. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 181, 84 N.W.2d 593, 603 (1957).

In support of their argument, appellants cite an affidavit from Folkert stating that "Home Federal was informed that some of [the funds deposited with Home Federal to obtain further loan disbursements] were being lent by First Integrity, and Doug Amundson did not object." Appellants claim that this evidence creates a genuine issue of material fact as to the issue of waiver.

This evidence might be sufficient to establish a genuine issue of material fact as to Home Federal's knowledge of the loan from First Integrity. But as the district court noted, appellants have failed to offer any evidence that Home Federal was aware that a subordinate mortgage lien would be placed on the property in conjunction with the loan. Without any evidence that Home Federal voluntarily and intentionally relinquished its right to prohibit subordinate loans on the property, the district court did not err in rejecting this defense.

II.

Finally, appellants claim that the district court abused its discretion in appointing a receiver. *See Minn. Hotel Co. v. ROSA Dev. Co.*, 495 N.W.2d 888, 891 (Minn. App. 1993) (stating that the appointment of a receiver is reviewed for an abuse of discretion).

Here, the mortgage states that upon default, Home Federal "*may* apply to the court for appointment of a receiver pursuant to Minnesota Statutes." (Emphasis added.) Home Federal moved for appointment of a receiver pursuant to Minn. Stat. § 559.17, subd. 2(3)(ii)(a) (2008). Subdivision 2 provides in pertinent part:

> Subd. 2. **Assignment; Conditions**. A mortgagor may assign, as additional security for the debt secured by the mortgage, the rents and profits from the mortgaged real property . . . .
>
> . . . .
>
> The assignment may be enforced . . . as follows:
>
> (a) if, by the terms of an assignment, *a receiver is to be appointed* upon the occurrence of some specified event, and a showing is made that the event has occurred, the court shall, without regard to waste, adequacy of the security, or solvency of the mortgagor, appoint a receiver . . . or

> (b) if no provision is made for the appointment of a receiver in the assignment *or if by the terms of the assignment a receiver may be appointed*, the assignment shall be binding upon the assignor unless or until a receiver is appointed without regard to waste, adequacy of the security or solvency of the mortgagor, but only in the event of default in the terms and conditions of the mortgage, and only in the event the assignment requires the holder thereof to first apply the rents and profits received as provided in section 576.01, subdivision 2 . . . .

Minn. Stat. § 559.17, subd. 2(3)(ii) (emphasis added).

The district court declined to appoint a receiver pursuant to subdivision 2(3)(ii)(a) because this provision applies only when the terms of an assignment mandatorily require appointment of a receiver upon the occurrence of a specified event. The court noted that use of the term "may" in the mortgage clause indicated that the appointment of a receiver was only permissive. Because subdivision 2(3)(ii)(a) did not apply, the district court looked to subdivision 2(3)(ii)(b) in appointing the receiver.

Appellants contend that the district court abused its discretion by appointing a receiver pursuant to subdivision 2(3)(ii)(b). They note that Home Federal only cited subdivision 2(a) in requesting appointment of a receiver. They also claim that the terms of the mortgage obligated Home Federal to satisfy the more onerous requirements of Minn. Stat. § 576.01 (2008).

We disagree. Appellants fail to cite any authority for the proposition that a party must cite the exact statutory provision for appointment of a receiver before it is entitled to such relief. Moreover, the terms of the mortgage do not require Home Federal to seek the appointment of a receiver under Minn. Stat. § 576.01. The mortgage requires only that

the request for appointment of a receiver be made "pursuant to Minnesota Statutes." Here, the receiver was appointed pursuant to Minn. Stat. § 559.17, subd. 2(3)(ii)(b). This provision allows for appointment of a receiver pursuant to terms of an assignment if an event of mortgage default has occurred, and the assignment requires the holder thereof to first apply the rents and profits received as provided in section 576.01, subdivision 2. Minn. Stat. § 559.17, subd. 2(3)(ii)(b). There is no dispute that these elements are satisfied. Accordingly, the district court did not abuse its discretion in appointing a receiver.

Affirmed.