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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1213

George O. Ensminger and Donnie B. Ensminger,
on behalf of themselves and others similarly situated,
Appellants,

vs.

Timberland Mortgage Services, Inc., et al.,
Respondents,

The Mortgage Shop, Inc., d/b/a Exceptional Mortgage and Funding, Inc.,
Defendant,

ATI Title Company, Inc.,
Respondent.

Filed April 20, 2010
Affirmed in part and reversed in part
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-07-20195

Richard J. Fuller, Benjamin R. Elwood, Douglas L. Micko, Schaefer Law Firm, LLC, Minneapolis, Minnesota (for appellants)

Robert B. Bauer, Matthew J. Schaap, Jessica L. Sanborn, Severson, Sheldon, Dougherty & Molenda, P.A., Apple Valley, Minnesota (for respondents Timberland Mortgage Services, Inc., Thomas L. Hennen, III, and Robert E. Dougherty)

Mark W. Vyvyan, Fredrikson & Byron, Minneapolis, Minnesota; and

Douglas W. King (pro hac vice), Bryan Cave LLP, St. Louis, Missouri (for respondent ATI Title Company, LLC)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellants challenge the district court's award of summary judgment in favor of the lender that financed the purchase of their home in 2004, two principals of that company, and the title company that performed the closing. We conclude that appellants failed to raise a genuine issue of material fact as to whether they received a discounted interest rate on their loan and that the rest of their claims fail as a matter of law. Accordingly, we affirm summary judgment in favor of respondents. But because appellants are not contractually obligated to pay for the title company's clerical error, we reverse the judgment of $16.50 entered against appellants in favor of respondent title company.

FACTS

In 2007, appellants Donnie B. Ensminger (Ensminger) and George O. Ensminger[1] sued the various parties involved with their 2004 real estate closing. They alleged at least five irregularities that occurred during or leading up to the closing: (1) the interest rate on the loan received from respondent Timberland Mortgage Services, Inc. was not discounted; (2) Timberland failed to make certain required disclosures; (3) respondent

[1] George Ensminger did not sign all of the loan documents, but he does have an interest in the property used as security for the loan. Because his property interest is affected by the loan, he has standing to appeal summary judgment despite no contractual obligation to repay the loan.

ATI Title Company, LLC[2] failed to disclose the fee for optional owner's coverage; (4) ATI overcharged appellants $3 for a recording fee; and (5) ATI did not properly disclose the charge for a plat drawing.

Defendant The Mortgage Shop (TMS) contacted appellants in August 2003, offering to assist them in purchasing and financing a home. In December 2003, TMS assisted appellants in obtaining a pre-approved mortgage. Because she had better credit, Donnie Ensminger individually applied for the loan instead of jointly with her husband. TMS arranged for a loan to be financed by Timberland. Timberland did not enter into loans it could not sell on the secondary market, and Timberland planned on selling this particular loan to Wells Fargo. Wells Fargo required that the conditions of the loan be verified by an independent underwriter, MGIC. MGIC determined that for the particular program in which appellants were interested—a program called "emerging markets" that had a loan-to-value ratio of 100%, i.e., no money down—the maximum interest rate it would underwrite for Ensminger was 4.375%. According to Timberland, "[it was] the maximum the underwriter at the time felt that they would allow the interest rate to be due to debt ratios." An affidavit submitted by Timberland states that the interest rate it would have offered Ensminger at that time (the "par rate") was between 4.5% and 4.625%.

But Timberland was willing to offer Ensminger an interest rate of 4.375% in exchange for a fee of .387% of the loan amount. Timberland referred to this charge as a "discount fee." A discount fee is described by Timberland and appellants as a fee paid to

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[2] Appellants named ATI Title Company, Inc. as the defendant, but ATI clarified that it is in fact an LLC.

the lender in exchange for an interest rate below the "par rate" for the day. On January 12, 2004, TMS requested a rate lock-in from Timberland for a purchase-price loan at 4.375%, with a discount fee of .387%. Timberland agreed to lock in a 4.375% interest rate (in exchange for the discount fee) for 30 days, until February 10, 2004. On February 9, 2004, TMS requested an extension of the lock-in agreement. Timberland agreed to extend the lock-in period until February 17 for an additional fee of .25% of the principal. This resulted in a total fee of .637% of the principal.

Appellants closed on the sale of their new home on February 12, 2004. At closing, appellants received a loan from Timberland pursuant to the conditions outlined in the rate-lock extension and in a good-faith estimate (GFE) prepared by Timberland. Appellants received an interest rate of 4.375% on an adjustable-rate mortgage and paid .637% of the $162,000 principal, or $1,031.94, as a loan discount fee to Timberland. ATI performed the closing for a closing fee of $250. Both the GFE prepared by Timberland and one prepared by TMS disclosed a closing fee of $225. ATI also charged $44 for recording fees—$20 to record the deed and $24 to record the mortgage. ATI did not charge a fee to record the assignment of the mortgage to Wells Fargo. According to the settlement statement, the seller paid $8,000 of the $8,170.51 in closing costs.

In 2007, appellants sued Timberland, ATI, TMS (who was never properly served), and the two principals of Timberland—respondents Thomas L. Hennen, III, and Robert E. Dougherty—on behalf of themselves and "all others similarly situated." Appellants claimed damages due to the above-outlined alleged irregularities under a variety of legal theories. Appellants claimed that the 4.375% interest rate was not discounted and that

Timberland therefore had improperly charged the discount fee and breached the contract. They also claimed that certain information was not properly disclosed by Timberland, that ATI failed to properly disclose a fee for a plat drawing and optional owner's coverage for title insurance, and that ATI overcharged them $3 for recording Timberland's mortgage. Appellants further alleged that ATI and Timberland violated various consumer-protection statutes by their actions. ATI cross-claimed against appellants for $16.50, claiming that it actually undercharged appellants $19.50 at closing because it forgot to charge for recording the assignment of mortgage to Wells Fargo. But ATI conceded that it overcharged the fee to record Timberland's mortgage by $3, resulting in a $16.50 claim against appellants.

All of appellants' claims were dismissed when the district court granted summary judgment in favor of the defendants. The district court also entered judgment in favor of ATI on its cross-claim against appellants for $16.50. This appeal follows.

D E C I S I O N

Summary judgment is appropriate only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "A material fact is one which will affect the result or the outcome of the case depending on its resolution." *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994). The evidence must be viewed in the light most favorable to the

nonmoving party. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982). The purpose of summary judgment is to determine whether or not issues of fact exist, not to resolve issues of fact. *Albright v. Henry*, 285 Minn. 452, 464, 174 N.W.2d 106, 113 (1970).

I. Claims against Timberland

A. Discount fee

The gravamen of appellants' complaint seems to be a belief that, although they paid over $1,000 for a discounted interest rate, they did not receive a discounted rate. They base this conclusion on one of two theories. First, appellants claim that the rate could not have been discounted because Timberland would not have given Ensminger a loan with a higher interest rate. Alternatively, they base their claim on a disclosure form they received from Timberland that explained how their adjustable rate might be adjusted in the future.

Appellants agree that a discounted rate is anything below a lender's daily par rate. But appellants contend that because the par rate was not available to Ensminger in the program that appellants requested (the "emerging-markets" program requiring no down-payment), the rate that Ensminger was offered was not lower than a rate she might have otherwise received and, therefore, was not discounted. Appellants seem to equate the fact that the underwriter placed a maximum interest rate on the specific program they requested with the idea that Timberland did not have any loans available to Ensminger with a higher interest rate. There is no evidence that 4.375% was the highest rate

available to Ensminger. It was simply the highest rate Timberland could give Ensminger and still get the loan approved by an independent underwriter.

In addition, the evidence provided by Timberland shows that its par rate at that time, for Ensminger, was greater than 4.375%. But because MGIC would not verify a loan with an interest rate higher than 4.375%, Timberland charged appellants a discount fee to lower the initial interest rate that corresponded to Ensminger's risk factors (its par rate) to 4.375%. We agree with the district court that "[w]hile [4.375%] was the maximum rate allowed by the insurance, the evidence reflects that it was a discount rate for Timberland."

Appellants' alternative theory to support their claim that they did not receive a discounted rate is based on an "ARM Program Disclosure" form they received at closing. Appellants assert that the paragraph under the heading "how your payment can change" on the form proves that their initial interest rate was not discounted. The paragraph provides:

> For example, on a $10,000 30-year term loan with an initial interest rate of 4.375% (based on the 1.280% index value rate in effect on January, 2004, plus a margin of 2.750% and plus a premium of 0.345%, rounded as provided above), the maximum amount that the interest rate can rise under this program is 5.0 percentage points . . . .

According to appellants, their initial 4.375% interest rate must also include a premium, as described in the example above, and therefore could not include a discount. But this section clearly deals with adjustments to the initial rate. The ARM disclosure form also states under the heading "how your interest rate and payments are determined" that

"[y]our initial interest rate is not based on the index used to make later adjustments. Ask us for the current amount of our adjustable-rate mortgage discounts or premiums." This section of the form very clearly states that appellants' initial interest rate was *not* calculated using the formula used to calculate later adjustments. But appellants ignore this section and maintain that this ARM disclosure form raises an issue of fact as to whether their interest rate was discounted. We disagree. The evidence presented shows that 4.375% was below Timberland's par rate for Ensminger at that time, and Ensminger agreed to pay a discount fee in exchange for this rate. The ARM disclosure form does not change these facts.

Because appellants have failed to raise a genuine issue of material fact as to whether or not the interest rate they received from Timberland was discounted, we agree with the district court's decision to grant Timberland's motion for summary judgment on appellants' claims related to the interest rate.

B. Disclosure of non-agency status

Appellants claim that Timberland failed to disclose its non-agency status to Ensminger as required by Minn. Stat. § 58.15, subd. 1 (2008). Timberland argues that appellants do not have standing to bring a claim under this chapter because there was no private right of action under this chapter at the time that appellants commenced this lawsuit. *See* Minn. Stat. §§ 58.01–.17 (2006).[3] We agree. Because appellants lack

[3] A private right of action for this chapter was added in 2007, after appellants brought their initial complaint, but it still does not include a right of action under Minn. Stat. § 58.15 (2008). Minn. Stat. § 58.18, subd. 1 (Supp. 2007).

standing to bring claims under this section, summary judgment in favor of Timberland on this claim is appropriate.

C. Disclosures

Appellants argue that failing to make certain required disclosures constitutes deceptive trade practices under Minn. Stat. §§ 325D.44, 325F.69 (2008).[4] Minn. Stat. § 325D.44, subd. 1(11), defines a deceptive trade practice as one that occurs when a person "makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions." If a person commits a deceptive trade practice, the Uniform Deceptive Trade Practices Act (Minn. Stat. §§ 325D.43–.48 (2008)) allows for injunctive relief only. Minn. Stat. § 325D.45. Because Timberland is no longer in business, injunctive relief is not available. Because appellants are unable to seek damages under this act, no relief is available; their claim is appropriately dismissed on summary judgment.

Minn. Stat. § 325F.69, subd. 1, states:

> The 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

[4] Appellants claim that Timberland failed to disclose the terms of the rate lock-in agreement as required by Minn. Stat. § 47.206 (2008), failed to disclose the availability of a higher-investment-grade loan as required by Minn. Stat. § 58.13, subd. 1(18) (2008), and failed to disclose its non-agency status as required by Minn. Stat. § 58.15. Appellants only attempted to bring a direct claim under Minn. Stat. § 58.15 (as discussed). Appellants never directly referred to the requirements of Minn. Stat. § 47.206 in their complaint and only referred to the requirements in section 58.13 by claiming that Timberland's failure to make these disclosures constituted deceptive trade practices. We do not decide issues not raised and determined by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, we only address any alleged violation of sections 47.206 and 58.13 in the context of appellants' consumer-protection claims.

> rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

But a civil action under this section must be brought by "[t]he attorney general or any county attorney." Minn. Stat. § 325F.70, subd. 1 (2008). A suit by private citizens such as appellants can only be brought under the private attorney-general statute. Minn. Stat. § 8.31, subd. 3a (2008). Under this subdivision, "any person injured by a violation of any of the laws referred to in subdivision 1 [including consumer fraud] may bring a civil action and recover damages." *Id.*

The Minnesota Supreme Court has clarified that the scope of a private citizen's claim under the private attorney-general statute is limited by "the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws." *Ly v. Nystrom*, 615 N.W.2d 302, 313 (Minn. 2000). The supreme court held that "the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public." *Id.* at 314. A cause of action does not benefit the public when it is based on "a single one-on-one transaction in which the fraudulent misrepresentation . . . was made only to [the injured party]." *Id.* The Eighth Circuit has also persuasively explained that "[t]he class of plaintiffs under the private attorney general statute would be limitless if we assumed that one individual's negative experience with a company was necessarily duplicated for every other individual and on that basis treated personal claims as benefiting the public," since this "might well render nearly every private suit alleging fraud a public benefit case." *Davis v. U.S. Bancorp*, 383 F.3d 761, 768 (8th Cir. 2004).

Appellants concede that "there is no evidence of record as to how many persons . . . paid Timberland a discount fee that included undisclosed rate lock fees, or how many persons qualified for a lower interest rate but failed to receive [a required] disclosure." But they argue that the district court, in the absence of any evidence, cannot presume that appellants were the only people harmed by Timberland's conduct. But on summary judgment

> there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). Accordingly, appellants cannot simply imply that other persons may have been affected by Timberland in order to survive summary judgment. Because appellants have not provided any evidence of a public benefit that would result from the successful litigation of their consumer-fraud claim against Timberland, this claim fails as a matter of law and summary judgment is appropriate.

The district court granted summary judgment to Timberland on appellants' claims regarding the alleged lack of disclosures by concluding that Timberland was not required to make the disclosures under the statute. We decline to determine whether Timberland was required to make these disclosures and conclude that appellants' claims with respect to any alleged lack of disclosures by Timberland were not raised to the district court or were appropriately dismissed due to appellants' lack of standing and the fact that

appellants' consumer-protection claims fail as a matter of law. *See Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995) (noting that an appellate court may affirm summary judgment on alternate legal theories), *review denied* (Minn. Feb. 13, 1996). Accordingly, we affirm the district court's decision to grant Timberland's motion for summary judgment.

II. Claims against ATI

Appellants sued ATI for breach of contract, breach of fiduciary duty, unjust enrichment, and deceptive trade practices. All of appellants' claims were dismissed on ATI's motion for summary judgment. On appeal, appellants do not argue the merits of their common-law claims of breach of contract, breach of fiduciary duty, or unjust enrichment. Accordingly, we conclude that appellants have waived their opportunity to appeal the dismissal of their common-law claims against ATI. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

Instead, appellants focus on ATI's alleged violations of Minn. Stat. §§ 82.41, subd. 7, and 507.45, subd. 2 (2008). Appellants claim that ATI violated these statutes by: (1) failing to provide advance disclosure of the charge they paid at closing for owner's coverage on their title insurance, (2) failing to properly disclose a fee for a plat drawing, and (3) collecting recording fees that were not properly disclosed. Appellants assert that violating these statutes constitutes a deceptive trade practice as defined by Minn. Stat. § 325D.44 or consumer fraud as defined by Minn. Stat. § 325F.69. Without reaching whether the disputed charges were sufficiently disclosed or determining whether a failure to make a disclosure required under Minn. Stat. § 82.41, subd. 7, or Minn. Stat. § 507.45,

subd. 2, would violate consumer-protection laws, we conclude that ATI did not violate these statutes. Minn. Stat. § 82.41, subd. 7, provides that a "real estate closing agent may not charge a fee for closing services to a borrower" without previously disclosing the fee. This chapter regulates real-estate agents, and does not define what is considered a "fee for closing services." Similarly, Minn. Stat. § 507.45, subd. 2, states that "[n]o charge for closing services" may be made by a closing agent unless previously disclosed. This chapter also does not define a charge for a "closing service." Appellants allege that all of the fees received by ATI at closing would be considered fees for closing services within the purview of these statutes. We disagree.

The statutory sections allegedly violated by ATI specifically refer to a fee or a charge for "closing services." By their plain language, these statutory sections are not applicable to all fees or charges incurred by the borrower at closing—these sections apply only to an independent fee or charge imposed by the entity performing the closing as payment for its services. In this case, the disclosure requirements in these sections apply to the $250 fee charged by ATI for performing the closing. We conclude that the good-faith estimates that disclosed a $225 fee for ATI's closing services were sufficient to meet the statutory requirements. Accordingly, summary judgment in favor of ATI on appellants' consumer-law claims is appropriate.

Appellants next argue that ATI is not entitled to recover $16.50 from them. ATI relies on a compliance agreement signed by Ensminger at closing in support of its claim that appellants are required to pay this recording fee. But ATI's reliance is misplaced. The compliance agreement states that "Ensminger . . . agree[s] to reimburse ATI Title

Company . . . for any . . . additional recording fees . . . resulting from the payoff of" "any loan, lien, contract for deed, account, bill, real estate tax, special assessment and other encumbrance affecting the property." The additional recording fee that ATI is attempting to collect is for recording the assignment of the mortgage from Timberland to Wells Fargo. The need to pay this additional recording fee did not result from the payoff of an encumbrance affecting the property. ATI incurred this additional recording fee because of its admitted clerical error/omission in the settlement statement. ATI's claim that appellants are contractually obligated to pay for this recording fee is not supported by the language of the compliance agreement. ATI did not collect this fee at closing, and appellants are not contractually obligated to pay for it now.

Because all of appellants' claims were properly dismissed on respondents' motions for summary judgment, we affirm in part. But we reverse the district court's decision to enter judgment against appellants on ATI's cross-claim.

Affirmed in part and reversed in part.