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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-824

Highland Bank,
Respondent,

vs.

Zack Dyab, et al.,
Appellants.

Filed March 8, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-09-8347

Garth Gerald Gavenda, Anastasi & Associates, Stillwater, Minnesota (for respondent)

Sean Adam Shiff, Skolnick & Associates, Minneapolis, Minnesota (for appellants)

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

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

PETERSON, Judge

In this appeal from summary judgment in favor of respondent bank in its lawsuit against appellants as guarantors of certain loans, and against appellants on their counterclaims for breach of contract and violation of the implied covenant of good faith and fair dealing, appellants argue that the district court erred in ruling that no genuine issues of material fact exist as to whether (1) respondent bank's prior breach precludes it from enforcing any of its contracts against appellants; (2) respondent's breach of its duty of good faith and fair dealing precludes it from enforcing any of its contracts against appellants; (3) equitable estoppel should apply to respondent; (4) promissory estoppel should bar respondent from asserting claims against appellants; and (5) respondent's claims are barred by its unclean hands. We affirm.

FACTS

Appellant Zack Dyab is a real estate investor and developer who owns Danna D. Investors III LLC (DD III), Danna D. Investors VI LLC (DD VI), and FAE Roosevelt LLC (FAE). In June 2007, respondent Highland Bank agreed to lend DD VI $1 million to purchase and renovate a commercial building in Robbinsdale. Dyab and Julia Rozhansky stated in affidavits that the loan agreement required DD VI to make interest-only payments until the principal became due in three years. Dyab and Rozhansky also stated:

> The Robbinsdale loan included a 12-month interest "reserve" or "hold back," which was an amount that [respondent] would hold back from the initial funding from the loan to pay the interest due on the loan for the first year. Each month, [respondent] was supposed to advance 1/12th of the "reserve" and pay that month's interest on the loan. These monthly advances and interest payments were handled internally by [respondent].

In July 2007, respondent agreed to lend FAE $3.4 million to buy and develop a commercial building in Hopkins. Dyab and Rozhansky stated in affidavits:

> Similar to the Robbinsdale loan, FAE was required to make interest only payments for three years with the principal due in three years. . . .
>
> As a condition of the Hopkins financing, [respondent] required FAE to divide the construction loan into two phases. Phase I was to be used for the improvement of the space to be occupied by FAE and related entities. Phase II was to be used for the improvement of rental space, and was to be funded on presentation to [respondent] by FAE of leases for that rental space.

Dyab further stated:

> The Hopkins loan also included a 12-month interest reserve, which [respondent] was supposed to use to pay the interest on that loan for the first year. Our initial construction statement submitted to [respondent's former employee Michael Tobias] included a 12-month interest reserve. In a subsequent meeting between Tobias, our architect, our construction contractor, [Rozhansky], and myself, Tobias stated that the overall contract amount for the Hopkins loan was approved by [respondent] but that [respondent] wanted some of the interest reserve to be re-allocated among other line items on the construction statement. Rozhansky and I told Tobias that we needed 12 months of interest reserve for the Hopkins project because that was how long the renovations would take to complete. Tobias explained that the 12-month interest reserve was still there and available to pay the interest on the Hopkins loan for one year, but some of the money would show up in other line items in the construction statement.

The FAE loan was secured by (1) a mortgage on the Hopkins property; (2) guaranties executed by Dyab personally and by three corporations that Dyab owned; and (3) a reserve account at respondent bank with a starting balance of $900,000, which was later increased to $1.1 million and then to $1.65 million.

In January 2008, respondent issued a revolving credit line to DD III to be used to buy and renovate residential rental properties. Initially, the credit line was for $1 million, but it was increased to $1.4 million in February 2008 and to $2.5 million in March 2008. The credit line was secured by Dyab's personal guaranty and by mortgages on the properties bought with funds advanced under the credit line.

The DD III credit-line agreement states that a default occurs if judgments against a guarantor exceeding $10,000 are outstanding for more than 30 days without a stay of execution. Respondent submitted the results of a judgment-records search, which show that outstanding judgments exceeding this amount existed against Dyab before respondent declared the loan in default. Respondent foreclosed on all of the mortgages and applied the foreclosure-sale proceeds to the amount owed on the DD III loan. Respondent claims that $816,544.59 remained due on the loan after applying the sale proceeds, although the amount is disputed.

The FAE loan agreement states that a default occurs if judgments against a guarantor exceeding $50,000 are outstanding for more than 60 days. The results of a judgment-records search show that outstanding judgments exceeding this amount existed against Dyab before respondent declared the loan in default. Respondent foreclosed on the FAE mortgage and applied the foreclosure-sale proceeds to the loan. Respondent also applied the balance of the reserve account to the amount due on the FAE loan. Respondent claims that $416,967.28 remained due on the FAE loan after applying the sale proceeds and reserve account, although the amount is disputed. The FAE loan and the DD III credit line contain provisions that prohibit modification, except in writing.

Respondent brought this action against appellant guarantors to recover the amounts owed on the DD VI loan, the FAE loan, and the DD III credit line and attorney fees. Appellants filed counterclaims for breach of contract, violation of an implied covenant of good faith and fair dealing, and misrepresentation.

Appellants claim that the defaults occurred due to misrepresentations made by Tobias that (1) both the FAE loan and the DD VI loan included 12-month interest-hold-back provisions that required respondent to retain a portion of the loan proceeds to be used to pay interest on the loans during the first year; (2) respondent would pay interest on the reserve account at the rate of 4.65%; (3) respondent would use funds from the reserve account to make payments on the FAE loan, the DD III loan, and the DD VI loan if a default or delinquency occurred; (4) Dyab had additional time to lease space in the FAE property and should not worry because he had \$1.4 million on deposit, which could be used to make the monthly loan payments if necessary; (5) respondent would use the reserve account to cure any defaults until the property was leased; and (6) when respondent reduced the interest rate on the reserve account to 1.25%, Tobias stated that it was a mistake and would be changed back to 4.65%. Appellants also claim that respondent wrongfully refused to fund FAE's draw request in August 2008, which was necessary to complete renovations, and that, as a result, FAE was unable to lease the property and obtain funds to make loan payments.

Respondent moved for summary judgment and attorney fees. The district court granted summary judgment for respondent on the issue of liability but determined that fact issues exist as to damages. The district court also granted summary judgment for respondent on its claim for attorney fees but reserved the amount of the award. The district court dismissed with prejudice appellants' counterclaims for breach of contract on the FAE loan and DD III credit line. The district court denied dismissal of a breach-of-contract counterclaim on the DD VI loan because the parties did not provide the loan documents to the court. The district court dismissed with prejudice appellants' counterclaim for breach of an implied covenant of good faith and fair dealing and denied dismissal of appellants' counterclaim for misrepresentation.

The parties stipulated to a confession of judgment. The district court expressly determined that there was no just reason for delay and expressly directed the entry of partial judgment, and partial judgment was entered on the order granting summary judgment. This appeal followed.

ANALYSIS

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002).

I.

Parol Evidence Rule

Appellants argue that the district court erred in concluding that there is not a genuine issue of material fact regarding whether respondent's breaches of oral agreements reached between Tobias and FAE or DD III preclude respondent from enforcing any of the loan agreements against appellants. Appellants contend that respondent breached agreements reached between Tobias and appellants that (1) both the FAE loan and the DD VI loan include 12-month interest-hold-back provisions that require respondent to retain a portion of the loan proceeds to be used to pay interest on the loans during the first year; (2) Dyab would earn interest on the reserve account at the rate of 4.65%, which would be paid to Dyab monthly; and (3) respondent would use funds from the reserve account to make payments on the FAE loan, the DD III loan, and the DD VI loan if a default or delinquency occurred during the period between construction and obtaining tenants. But none of these agreements is expressed in the loan documents.

Appellants argue that the district court erroneously concluded that any argument that contradicts the terms of the written loan agreements is barred by the parol evidence rule. "The parol evidence rule prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003) (quotation omitted). "[W]hen parties reduce their agreement to writing, parol evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement." *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 713 (Minn. 1985).

Citing *Flynn v. Sawyer*, 272 N.W.2d 904, 908 (Minn. 1978), appellants contend that under an exception to the parol evidence rule, when a written agreement is incomplete or ambiguous, parol evidence is admissible to explain the meaning of its terms. We agree with appellants that when "a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible." *Gutierrez v. Red River Distrib., Inc.*, 523 N.W.2d 907, 908 (Minn. 1994) (quotation omitted). But appellants do not identify any terms in the loan documents that they contend are ambiguous, and appellants have not presented evidence sufficient to establish a genuine issue of fact with respect to whether the written agreements are incomplete.

The supreme court has explained that

> [i]t is always competent to prove by parol the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.
>
> A determination of whether the written document is a complete and accurate "integration" of the terms of the contract is not made solely by an inspection of the writing itself, important as that is, for the writing must be read in light of the situation of the parties, the subject matter and purposes of the transaction, and like attendant circumstances.

Bussard v. Coll. of St. Thomas, Inc., 294 Minn. 215, 224, 200 N.W.2d 155, 161 (1972) (quotation omitted).

However, in *Alpha Real Estate Co.*, the supreme court explained further that "*Bussard* did not involve an agreement that included a merger clause. A merger clause establishes that the parties intended the writing to be an integration of their agreement." 664 N.W.2d at 312. The lease at issue in *Alpha Real Estate Co.* contained a merger clause, which stated, in part, "'This Lease Agreement contains the entire agreement between the parties and shall not be modified or amended in any manner except by an instrument in writing executed by the parties hereto.'" *Id.* at 313. Noting that the merger clause specifically stated that the lease was the entire agreement between the parties, the supreme court concluded that it did not need to look beyond the written lease to determine whether it was a complete integration. *Id.*

The FAE agreement contains a merger clause, which states:

> This agreement contains the entire agreement of the parties on the matters covered herein. No other agreement, statement or promise made by any party or by any employee, officer or agent of any party that is not in writing and signed by all parties to this Agreement shall be binding.

Under *Alpha Real Estate Co.*, because this merger clause states that the written agreement is "the entire agreement of the parties," we need not look beyond the written FAE loan agreement to determine whether the written agreement is a complete integration of the parties' agreement, and we conclude that the written agreement is a complete integration. Consequently, the exception to the parol evidence rule cited by appellants does not apply, and extrinsic evidence of prior or contemporaneous oral agreements is inadmissible to prove the meaning of the FAE agreement.

The DD III credit-line-agreement documents do not include a merger clause stating that the documents are a complete integration of the parties' agreement. Therefore, we must look beyond the written agreement to determine whether the parties did not intend the documents to be a complete integration of their agreement. But the only evidence that appellants have offered to show that the agreement is incomplete is oral testimony that parts of the parties' agreement were not included in the written agreement. The supreme court long ago considered a similar set of facts and concluded that parol evidence was inadmissible to prove that the terms of a contract were different from the terms of a written instrument.

In *Samuel H. Chute Co. v. Latta*, a lessor and lessee joined with a third party in a written agreement that assigned the lease to the third party and required the third party to assume the lessee's obligations. 123 Minn. 69, 70, 142 N.W. 1048, 1048 (1913). When the lessor brought an action to recover two installments of rent due, the third party raised as a defense that there was a concurrent oral agreement that the written contract should no longer be operative if the third party formed a corporation and assigned the lease to the corporation. *Id.* The third party claimed that the corporation had been formed and the lease had been assigned to it. *Id.* In considering whether the third party was permitted to prove the oral agreement that the written contract should not be enforced, the supreme court explained:

> It is true that, where a part only of the agreement between the parties is reduced to writing, it is competent to prove by parol the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms. But this agreement was not incomplete. The criterion of the completeness or incompleteness of the writing is the writing itself. We do not mean that the court is limited to a mere inspection of the document. As in other cases of doubtful construction, the court is at liberty to view the circumstances under which, and the purpose for which, the writing was executed. Where the writing, construed in the light of such circumstances, shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol

> evidence can be permitted to introduce a term which does not appear there.
>
> Tested by this rule it cannot be held that the written contract is incomplete. By its terms it makes the obligation to pay absolute. There are no surrounding circumstances that place the contract in any different light. The proof of surrounding circumstances that defendant introduced was simply proof that the contract made was different from the terms of the written instrument. Such evidence is not permissible. To allow a party to lay the foundation for such parol evidence by oral testimony that only part of the agreement was reduced to writing, and then prove by parol the part omitted, would be to work in a circle and to permit the very evil which the rule was designed to prevent.

Id. at 71-72, 142 N.W. at 1049 (citations omitted).

As in *Chute*, the only evidence of surrounding circumstances that appellants have presented is testimony that Tobias made representations and agreements that were not included in the DD III written agreement. Under the reasoning in *Chute*, this evidence is inadmissible to prove that the written agreement is not a complete integration of the parties' agreement. Consequently, the exception to the parol evidence rule cited by appellants does not apply and extrinsic evidence of prior or contemporaneous oral agreements is inadmissible to prove the meaning of the DD III agreement.

Statute of Frauds

Again citing *Flynn*, appellants also argue that they are not barred by the parol evidence rule from introducing evidence about the agreements with, and representations by, Tobias because "[t]he parol evidence rule does not exclude evidence of subsequent oral modifications to a contract." 272 N.W.2d at 907. The district court rejected appellants' arguments regarding subsequent oral modifications to the written contracts to include agreements to hold back loan proceeds to pay interest for 12 months and to use the reserve account to make loan payments because it determined that such modifications are unenforceable under the statute of frauds in Minn. Stat. § 513.33 (2010).

That statute provides 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." *Id.*, subd. 2. The statute also provides that an "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" does "not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2." *Id.*, subd. 3a(3). Under the statute, "'credit agreement' means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation." *Id.*, subd. 1(1).

The district court determined that the alleged hold-back and reserve-account modifications of the written loan agreements would be agreements to forbear from exercising the remedies under the written agreements, and, therefore, because the modifications are not in writing, appellants do not have a claim that a new credit agreement was created. Appellants argue that Minn. Stat. § 513.33, subd. 2, does not apply to this case because Dyab was not maintaining an action against respondent and was, instead, "alleging Tobias' agreements and representations as a defense to [respondent's] claims on the personal guarantee." But the district court's decision was based on subdivision 3 of the statute, not subdivision 2. Appellants claimed that respondent's prior breach of the loan-agreement modifications precluded respondent from enforcing the agreements. Under subdivision 3, Tobias's agreements and representations do not give rise to a claim because they are not in a writing signed by the creditor and the debtor that expresses consideration and sets forth the relevant terms and conditions of the agreements.

Because the parol evidence rule bars appellants from using extrinsic evidence of prior or contemporaneous agreements to explain the meaning of their loan agreements and the statute of frauds in Minn. Stat. § 513.33 bars appellants from asserting claims based on subsequent oral modifications of the written agreements, appellants have not presented admissible evidence of any agreement that is not expressed in the loan documents. Consequently, we agree with the district court that there is not a genuine issue of material fact regarding whether respondent's breaches of oral agreements reached between Tobias and FAE or DD III preclude respondent from enforcing any of the loan agreements against appellants, and respondent is not precluded from enforcing the written agreements.

II.

Appellants argue that the district court erred in concluding that there is no genuine issue of material fact whether respondent's breach of its duty of good faith and fair dealing precludes it from enforcing any of its contracts against appellants. "[E]very contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance." *In re Hennepin Cnty. 1986*

Recycling Bond Litig., 540 N.W.2d 494, 502 (Minn. 1995) (quotation omitted). "Actions are done in good faith when done honestly, whether it be negligently or not[, and] actions are done in bad faith when a party's refusal to fulfill some duty or contractual obligation [is] based on an ulterior motive, not an honest mistake regarding one's rights or duties." *Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 889 (Minn. App. 2003) (second alteration in original) (quotations omitted).

With one exception, appellants' arguments that respondent breached its duty of good faith and fair dealing are based on the oral agreements that appellants claim were part of the FAE and DD III loan agreements. Because we have concluded that appellants may not introduce evidence of these oral agreements, we also conclude that appellants have not established a genuine issue of material fact regarding whether respondent breached its duty of good faith and fair dealing with respect to these oral agreements.

Appellants' only remaining argument that respondent breached its duty of good faith and fair dealing is that respondent failed to properly fund an August 2008 draw request on the FAE loan. But the FAE loan agreement states that a condition of default occurs if "[a]ny judgment in excess of Fifty Thousand Dollars . . . is entered into against . . . the Guarantors . . . and is not released, satisfied or discharged or bonded to the Lender's satisfaction within sixty (60) days of the filing or entering thereof." The loan agreement also states that in the event of any event of default, the lender has the right "[t]o refrain from making any Advance under this Agreement." The record includes the results of a judgment-records search, which show that a judgment against Dyab in excess of $293,000 was entered in Hennepin and Ramsey counties on May 21, 2008. This means that in August 2008, respondent had the right under the plain language of the FAE loan agreement to refrain from making an advance. Therefore, we agree with the district court that appellants have not established a genuine issue of material fact regarding whether respondent breached its duty of good faith and fair dealing when it failed to fund the August 2008 draw request.

III.

Appellants argue that even if Tobias's agreements and representations are unenforceable under Minn. Stat. § 513.33, they can still be the basis for applying equitable estoppel and promissory estoppel. An agreement may be taken out of the statute of frauds by application of the doctrine of equitable or promissory estoppel. *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984).

Equitable Estoppel

When applying the statute of frauds "will protect, rather than prevent, a fraud, equity requires that the doctrine of equitable estoppel be applied." *Lunning v. Land O'Lakes*, 303 N.W.2d 452, 457 (Minn. 1980). But the following conditions must first be met:

> 1. There must be conduct—acts, language or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances

> that it is both natural and probable that it will be so acted upon. * * * 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Id. (emphasis omitted) (quoting 3 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 805 (5th ed. 1941)); *Transamerica Ins. Grp. v. Paul*, 267 N.W.2d 180, 183 (Minn. 1978).

Appellants have not identified any evidence that would satisfy the first condition for applying equitable estoppel, that Tobias represented or concealed a material fact.[1] Appellants simply argue that Tobias agreed to use the reserve account to pay monthly loan payments until renters were in place. Without a representation or concealment of a material fact, equitable estoppel will not take Tobias's agreement out of the Minn. Stat. § 513.33 statute of frauds. And even if we concluded that the effect of Tobias's representation was to conceal a material fact by incorrectly stating the substance of the parties' written agreements, the representation would not establish a basis for applying equitable estoppel because the truth about the terms of the agreements was not unknown

[1] For the purpose of applying equitable estoppel, we consider only representations that Tobias made after the parties executed the original FAE loan and DD III credit-line agreements because with respect to the original agreements, "the writing is the contract, not merely the evidence thereof. Antecedent and contemporaneous utterances are excluded, not because they are lacking in evidentiary value, but because the law for substantive reasons declares that such matters shall not be shown." *Lehman v. Stout*, 261 Minn. 384, 390, 112 N.W.2d 640, 644 (1961) (quotation omitted). Any representations that Tobias made before the agreements were executed were superseded by the written agreements.

to appellants, and, therefore, the third condition for applying equitable estoppel was not met.

Promissory Estoppel

The supreme court has discussed various views of the application of promissory estoppel in cases involving the statute of frauds:

> The Restatement rule is that promissory estoppel will defeat the statute of frauds only when the promise relied upon is a promise to reduce the contract to writing. Many of the courts which have considered the problem have either expressly adopted the Restatement rule or have simply rejected the view that promissory estoppel can remove an oral contract from the statute of frauds. The jurisdictions which adopt this restrictive view do so because a promissory estoppel exception would likely render the statute of frauds nugatory. There is always some degree of reliance on an oral contract. Some jurisdictions adopt the slightly less restrictive view advocated by Williston and permit promissory estoppel where the detrimental reliance is of such a character and magnitude that refusal to enforce the contract would permit one party to perpetrate a fraud. A mere refusal to perform an oral agreement, unaccompanied by unconscionable conduct, however, is not such a fraud as will justify disregarding the statute.

Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 283-84, 230 N.W.2d 588, 593-94 (1975) (footnotes omitted).

We have not found any opinion in which the supreme court has determined which view of promissory estoppel is the better view. *See Lunning*, 303 N.W.2d at 459 (declining to determine which view of promissory estoppel is better because neither view would save contract). But the supreme court has expressed a "desire not to apply an equitable principle to such an extent as to render meaningless the statute of frauds."

Sacred Heart Farmers Co-op Elevator v. Johnson, 305 Minn. 324, 328, 232 N.W.2d 921, 923 (1975). And we have not found any opinion in which the supreme court applied promissory estoppel to take an agreement out of the statute of frauds.

However, this court has applied promissory estoppel to reverse a summary judgment based on Minn. Stat. § 513.33. In *Norwest Bank Minnesota, N.A. v. Midwestern Mach. Co.*, the appellant entered into a buy-sell agreement to buy his former partner's interest in a business. 481 N.W.2d 875, 877 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). Appellant claimed that he agreed to the buy-sell plan only with assurances by the bank that the business's existing $5,000,000 line of credit would remain in place after appellant assumed full ownership of the business. *Id.* The district court granted summary judgment based on its conclusion that any agreement reached at the time the buy-sell agreement was executed was ineffective under Minn. Stat. § 513.33. *Id.* at 880.

This court reversed and remanded for trial on the issue of promissory estoppel, stating: "An agreement may be taken outside the statute of frauds by equitable or promissory estoppel. This policy makes sense since promissory estoppel is employed to imply a contract in law where none in fact exists." *Id.* (citation omitted). This court concluded that fact issues existed as to whether a bank employee had promised to indefinitely extend the $5,000,000 credit line to induce appellant to sign the buy-sell agreement and whether appellant reasonably relied on the promise. *Id.*

It is not apparent why, but in explaining the decision to reverse the summary judgment and remand for trial on the issue of promissory estoppel in *Midwestern*

Machinery, this court addressed only two of the three steps in a promissory estoppel analysis. Applying the third step in a promissory estoppel analysis to the evidence submitted in this case leads us to conclude that promissory estoppel does not take any of Tobias's subsequent agreements[2] out of the statute of frauds under Minn. Stat. § 513.33.

"Under promissory estoppel, a promise which is expected to induce definite action by the promisee, and does induce the action, is binding if injustice can be avoided only by enforcing the promise." *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992). The promise must be clear and definite, and the promisor must have intended to induce reliance on the part of the promisee and the promisee must have relied on the promise to the promisee's detriment. *Id*. Whether a clear and definite promise was made and whether the promisee reasonably relied on the promise are questions of fact. *Midwestern Machinery*, 481 N.W.2d at 880. But the third step in a promissory estoppel analysis, determining whether the promise must be enforced to prevent an injustice, "is a legal question for the court, as it involves a policy decision." *Cohen*, 479 N.W.2d at 391. The supreme court has emphasized "that the test is not whether the promise should be enforced to do justice, but whether enforcement is required to prevent an injustice." *Id*. This distinction is significant in this case because both written contracts provide that the

[2] As with equitable estoppel, we consider only representations that Tobias made after the parties executed the original FAE loan and DD III credit-line agreements because, with respect to the original agreements, no question of promissory estoppel is presented because promissory estoppel implies a contract in law when none exists in fact, and it is undisputed that the parties' original written agreements were contracts. *Lunning*, 303 N.W.2d at 459.

parties' agreement may only be modified in writing. As we have already stated, the FAE agreement contains a merger clause, which states:

> This agreement contains the entire agreement of the parties on the matters covered herein. No other agreement, statement or promise made by any party or by any employee, officer or agent of any party that is not in writing and signed by all parties to this Agreement shall be binding.

And the DD III agreement provides:

> Neither this Agreement nor any provision hereof may be modified, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.

Thus, to apply promissory estoppel to an unwritten promise that modifies the parties' original agreements, we would have to conclude that, even though the parties expressly agreed that any modification of their agreements must be in writing, the unwritten promise must be enforced to prevent an injustice. We see no basis in the record for reaching such a conclusion, and we, therefore, conclude that promissory estoppel will not take Tobias's subsequent agreements out of the Minn. Stat. § 513.33 statute of frauds.

It is apparent from the unambiguous language of the parties' written agreements that they contemplated the possibility that the agreements might be modified and agreed that any modification must be in writing. The record shows nothing about the parties' circumstances that indicates that it is unjust to give no effect to promises that were not reduced to a written agreement as required under the written contracts. The written contracts were available to all parties, and no evidence indicates that any party had special knowledge about the written contracts or about the parties' circumstances after the contracts were executed. There is no evidence of any impediment to any parties' ability to reduce a modification agreement to writing. Under these circumstances, it is not unjust to hold the parties to their written agreements.

IV.

Appellants argue that the district court erred in concluding that there is no genuine issue of material fact whether respondent's claims are barred by unclean hands. "Under the doctrine of unclean hands: he who seeks equity must do equity, and he who comes into equity must come with clean hands." *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 505 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Feb. 28, 2007). The doctrine of unclean hands bars a party who acted inequitably from obtaining equitable relief, but it does not bar a party with unclean hands from opposing a request for equitable relief. *Heidbreder v. Carton*, 645 N.W.2d 355, 371 (Minn. 2002)

Although respondent's complaint includes claims for equitable relief, the district court's summary-judgment memorandum demonstrates that the district court did not grant respondent equitable relief. Consequently, the doctrine of unclean hands does not bar any relief that respondent obtained.

Affirmed.