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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2092**

Park Midway Bank, N. A.,
Respondent,

vs.

R. O. A., Inc., et al.,
Appellants.

**Filed August 13, 2012
Affirmed, motion denied
Chutich, Judge**

St. Louis County District Court
File No. 69DU-CV-11-983

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(for respondent)

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Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellants challenge the district court's award of summary judgment to
respondent Park Midway Bank, N.A. on its claims and dismissal of appellants'
counterclaims. Appellants argue that the district court erred by dismissing their claim for

aiding and abetting a third party's breach of fiduciary duties, determining that appellants did not have standing to challenge the breaches of a separate loan agreement, and rejecting appellant's fraudulent-inducement argument. Because the district court properly granted Park Midway's summary judgment motions, we affirm. We also deny appellants' motion to include documentary evidence from a separate district court case.

FACTS

Respondent Park Midway Bank, N.A. (Park Midway) loaned appellant-defendants R.O.A., Inc. (ROA), Elbow Lake Investors, Inc., and Daniel O. Ashbach (collectively, borrowers) more than \$2 million in a series of loans. The borrowers defaulted on the loans, which all had maturity dates of April 15, 2010. The parties subsequently negotiated and entered into a Forbearance Agreement. Under the Forbearance Agreement, the loans were due on December 31, 2010. The borrowers then defaulted on the Forbearance Agreement, and Park Midway sued the borrowers to foreclose on the loans.

In a separate transaction, Park Midway loaned North Star Processing, LLC (North Star) \$5 million. North Star is a Delaware limited liability company in the business of drying and processing pharmaceutical and food materials and ROA was one of its six founding members. In response to Park Midway's suit against them, the borrowers asserted a number of counterclaims against Park Midway related to Park Midway's separate loan to North Star. The relevant facts underlying these counterclaims follow.

In October 2004, North Star and Park Midway signed a loan agreement that contained a number of affirmative and negative covenants. Under the agreement, North

Star must “keep true and accurate . . . accounts,” must have a debt-to-equity ratio no greater than 6.5 to 1 as of December 31, 2005, must not “[a]ssume, guarantee . . . or otherwise become liable for the obligation of any person, firm or corporation,” and must not “sell or transfer any real or personal property . . . and then or thereafter rent or lease as lessee such property.” Park Midway reviewed North Star’s compliance with the loan covenants on a yearly basis. If a loan covenant was violated, Park Midway determined whether a systemic problem or a one-time event caused the violation, and then decided what remedial action, if any, to take.

As collateral for the loan, North Star executed and delivered to Park Midway a lien against and a security interest in property owned by North Star (mortgaged property). ROA and Ashbach executed guaranties to secure North Star’s obligations to Park Midway. The North Star members also executed a joint written action authorizing Peter Duddleston, the president of North Star, to speak with Park Midway on behalf of North Star, and authorizing Park Midway to rely upon Duddleston’s representations.

In June 2006, Park Midway reviewed North Star’s compliance with the loan covenants. Although North Star had made all required loan payments, and has continued to make all payments to the date of the hearing of this appeal, it was out of compliance with certain covenants, including the debt-to-equity covenant. Duddleston informed Park Midway that it intended to offer new shares to raise \$250,000 in new capital. Based on North Star’s anticipated \$250,000 capital infusion from its stock offering, Park Midway agreed to waive compliance with the covenants for the previous year. On June 27, 2006,

Park Midway provided North Star with a formal waiver of the covenant violations occurring through December 31, 2005.

Duddleston informed Park Midway that North Star wanted to expand its operations by building a warehouse to house a second drying unit. To finance the expansion, Duddleston told Park Midway that North Star's owners had decided to create a new corporate entity, North Star Holdings, LLC, (the holding company). The holding company would then secure funding to build the warehouse and purchase the dryer. To execute this plan, Duddleston requested that Park Midway release a .53-acre sliver of land from the mortgaged property so North Star could transfer the sliver, as well as a piece of adjacent land, to the holding company. The holding company would then build the new warehouse on the transferred land. By transferring the land, North Star would be in violation of one of the loan agreement's covenants. Because Park Midway believed the land transfer would be in the best interests of North Star, it released the sliver from the mortgaged property and waived the covenant breach.¹

The lender financing the holding company's construction of the new warehouse required a commercial guaranty for the loan. Under the terms of the loan agreement, North Star was not allowed to guarantee any other loans. Accordingly, North Star requested that Park Midway consent to a covenant violation of their original loan agreement so that North Star could guarantee the holding company's loan. Duddleston

¹ The initial loan was guaranteed by the United States Department of Agriculture (USDA), which requires the USDA to approve any material changes to the loan agreement. Accordingly, on July 24, 2007, Park Midway requested that the USDA approve the land transfer, which the federal agency then provided.

informed Park Midway that Ashbach did not agree with the growth plan, but that a majority of North Star's owners had voted in favor of North Star guaranteeing the loan for the holding company. On October 10, 2007, the holding company secured the loan and North Star provided a commercial guarantee.

On January 24, 2008, Ashbach wrote to Park Midway to express concern that North Star was violating a number of covenants in the loan agreement that he had personally guaranteed. Ashbach requested that Park Midway look into the matter. Park Midway responded that “[a]ny minority shareholder dispute that . . . [Ashbach] may have with the balance of North Star . . . members is a private matter of which Park Midway . . . is not going to get involved in.” In February 2010, the borrowers filed suit against Nicholson, Duddleston, and other North Star officers (collectively, North Star defendants) in Ramsey County for breach of fiduciary duty, conversion, conspiracy, and various other claims. *ROA v. Nicholson*, No. 62-CV-10-1734 (Minn. Dist. Ct. July 25, 2011). Park Midway is not a party to that action.

When Park Midway sued the borrowers to foreclose the loans on which they defaulted, the borrowers asserted a number of counterclaims against Park Midway. These counterclaims included breach of the loan agreement between Park Midway and North Star, breach of an agreement to sell the North Star loan to them, and aiding and abetting breaches of fiduciary duties.

The parties filed cross motions for summary judgment. The district court granted Park Midway's summary judgment motion on its claims and entered a number of

judgments against the borrowers, totaling over \$2 million. The court also dismissed the borrowers' counterclaims. This appeal followed.

D E C I S I O N

A motion for summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010) (quotation omitted).

On an appeal from summary judgment, this court must determine whether there are any genuine issues of material fact and whether the district court erroneously applied the law. *Bearder v. State*, 806 N.W.2d 766, 770 (Minn. 2011). Appellate courts must construe the facts in the light most favorable to the party opposing summary judgment and review questions of law de novo. *Id.*

On appeal, the borrowers claim that the district court erred in (1) dismissing their counterclaim for aiding and abetting a breach of fiduciary duty; (2) dismissing their counterclaim for breach of the North Star loan agreement; and (3) rejecting their fraudulent inducement argument. For the reasons explained below, we conclude that the district court properly granted Park Midway summary judgment on its claims and dismissed the borrowers' counterclaims.

I. Aiding and Abetting

The borrowers contend that Park Midway aided and abetted the North Star defendants in breaching their fiduciary duties to ROA—specifically, Park Midway helped the North Star defendants usurp a corporate opportunity. The parties agree that Minnesota law governs the borrowers’ claim for aiding and abetting breach of fiduciary duty because the loan agreement was entered into in Minnesota and Park Midway is a Minnesota bank. Under Minnesota law, “[a] claim for aiding and abetting the tortious conduct of another has three elements: (1) the primary tort-feasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tort-feasor’s conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach.” *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). Regarding the first element, because North Star is a Delaware corporation, whether the North Star defendants breached their fiduciary duties is governed by Delaware law. *See Potter v. Pohlada*, 560 N.W.2d 389, 391 (Minn. App. 1997) (“The fiduciary duties of a corporation’s officers and directors are generally governed by the law of the state of incorporation.”).

Park Midway contends that the borrowers’ claim must fail as a matter of law because the borrowers cannot prove the North Star defendants committed a tort, as required by *Witzman*. 601 N.W.2d at 187 (“[T]he primary tort-feasor must commit a *tort*.” (emphasis added)). Specifically, Park Midway argues that the North Star member agreement sets forth the duties owed by the members and explicitly limits the duties to

those articulated in the agreement. It asserts, therefore, that the borrowers' claim against North Star for breach of fiduciary duty arises out of contract and not tort. *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 889 (Del. Ch. 2009) (stating that when a "claim arises solely from a breach of contract, the plaintiff generally must sue in contract, and not in tort" (quotation omitted)).

While the borrowers' claim against the North Star defendants may be a contract claim, this distinction does not appear to be relevant for the purposes of an aiding and abetting claim. *See Witzman*, 601 N.W.2d at 187 (applying Restatement (Second) of Torts elements for aiding and abetting breach of tortious conduct to a claim for aiding and abetting breach of fiduciary duty); *see also Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1126 n. 115 (Del. Ch. 2008) ("For purposes of the aiding and abetting claim, it does not matter whether the underlying breach arises from common law fiduciary duties or duties created by the [parties' agreement]."). Moreover, no evidence in the record shows that Park Midway raised this argument at the district court level.² Thus, the record is not fully developed and the issue of whether the North Star defendants' breach of fiduciary duty is a tort or contract claim under Delaware law is not properly before us. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Assuming the borrowers can demonstrate that the North Star defendants breached their fiduciary duties, the borrowers must also satisfy the knowledge and substantial assistance elements of the claim. *Witzman*, 601 N.W.2d at 187. The borrowers generally

² The district court concluded that "[w]hether the other owners of [North Star] breached their fiduciary duty to ROA and Mr. Ashbach is a question of fact that will be determined in the Ramsey County action."

allege that Park Midway knew North Star's actions or proposed actions would violate the loan agreement and that Park Midway provided substantial assistance by granting the covenant waivers. But they cite no evidence in the record that Park Midway *knew* the North Star defendants requested the waivers for an improper purpose. *See Witzman*, 601 N.W.2d at 186 (“[A]iding and abetting liability is based on proof of a scienter—the defendants must *know* that the conduct they are aiding and abetting is a tort.”).

When North Star requested the covenant waivers, Duddleston represented to Park Midway that the covenant waivers would be in the best interests of North Star and that a majority of North Star's owners approved of the waivers. Under the Joint Written Action, Park Midway was authorized to rely, and did rely, on Duddleston's representations, granting the covenant waivers because it believed that the waivers were in the best interests of North Star.

The borrowers have failed to point to specific facts in the record demonstrating that Park Midway had actual knowledge that the North Star defendants were engaging in tortious conduct. *See* Minn. R. Civ. P. 56.05 (stating that the party opposing a summary judgment motion “must present specific facts showing that there is a genuine issue for trial”). The borrowers' speculation is insufficient to withstand a motion for summary judgment. *See Rixmann v. City of Prior Lake*, 723 N.W.2d 493, 495 (Minn. App. 2006) (“[T]he party resisting summary judgment must do more than rest on mere averments.” (quotation omitted)), *review denied* (Minn. Jan. 24, 2007). The district court properly

dismissed the borrowers' claim that Park Midway aided and abetted a breach of fiduciary duty by the North Star defendants.³

II. Breach of Loan Agreement

The borrowers also sued Park Midway for breach of the North Star loan agreement for Park Midway's failure to enforce the loan covenants.⁴ The borrowers contend that the district court erred in finding that they were not parties to the loan agreement, and therefore could not challenge Park Midway's enforcement of the loan covenants. The loan agreement explicitly states that the agreement is between North Star and St. Anthony Park State Bank (Park Midway), and only Peter Duddlestone, as president of North Star, and James Ostlund, as vice president of Park Midway, signed the agreement. Merely

³ Citing Minn. R. Prof. Cond. 3.3, borrowers moved this court to consider an order for judgment issued by a consensual special magistrate in the Ramsey County action against the North Star defendants. That order is not part of the record for this appeal. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal). Nor do the rules of professional conduct govern the record on appeal. Generally, appellate courts do not consider matters outside the record on appeal, *Thiele*, 425 N.W.2d at 582, and, on appeal, new evidence "is never allowed" to reverse a judgment, *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 584 (Minn. 1977); *see Village Apartments v. State*, 335 N.W.2d 717, 718 n.3 (Minn. 1983) (addressing when appellate courts consider new evidence on appeal). Finally, we note that even if we did consider the order for judgment, doing so would not change our resolution of this appeal. As discussed above, even if we assume tortious behavior by the North Star defendants, the borrowers have not satisfied the remaining two elements of their aiding and abetting claim. Therefore, we deny the motion to consider the special magistrate's order.

⁴ As previously noted, it is undisputed that North Star has made all required payments on the Park Midway loan.

mentioning ROA and Ashbach as guarantors did not make them parties to the loan agreement.⁵

Even if the borrowers have standing to challenge the loan agreement between Park Midway and North Star, the district court concluded that the borrowers' claim fails because Park Midway did not breach the agreement. The loan agreement provides:

Upon the occurrence of any Event of Default, and the expiration of any applicable cure period, if any, the Lender *may, at its option and with notice*: Accelerate all amounts outstanding on the Note or any other indebtedness owed by Borrower to [the Bank] and demand immediate payment in full; foreclose any of its security interests or take such other actions available under the terms of this Agreement or the Loan Documents delivered pursuant hereto or in connection herewith, or take such actions as may otherwise be available in equity or law.

(Emphasis added.) “Event of Default” includes North Star’s failure to abide by the affirmative and negative covenants of the agreement. Under the terms of the loan agreement, Park Midway could have pursued remedies for North Star’s covenant

⁵ Alternatively, the borrowers argue that, because ROA is a member of North Star, they have standing to derivatively challenge the loan agreement. To support this argument, the borrowers cite *ROA v. Nicholson*, No. 62-CV-10-1734, in which the Ramsey County District Court found that the “[l]oan agreement is between Park Midway Bank and [North Star]. Plaintiff, ROA, has standing to bring a derivative claim as a member of [North Star] at the time of the complained transaction and a member through the time of bringing this action.” (Minn. Dist. Ct. July 25, 2011). No evidence in the record shows that the borrowers raised this argument at the district court level in the present case; the issue is therefore not properly before this court. *Thiele*, 425 N.W.2d at 582.

violations, but it was not required to do so.⁶ The district court properly granted summary judgment because Park Midway did not breach the loan agreement by choosing to waive the covenant violations.

III. Forbearance Agreement

Finally, the borrowers argue that the forbearance agreement between the borrowers and Park Midway was unenforceable. Specifically, the borrowers argue that Park Midway fraudulently induced them to execute the forbearance agreement based on Park Midway's assurances that it would transfer North Star's loans to the borrowers.

The forbearance agreement that Park Midway and the borrowers entered into does not state that it is contingent on the transfer of the North Star loan to the borrowers or mention the North Star loan in any way. To be sure, Park Midway and the borrowers exchanged correspondence regarding the potential sale and assignment of the North Star loans to borrowers at the same time that the parties were negotiating the forbearance agreement. The record demonstrates, however, that these negotiations were conducted separately. Park Midway sent two separate and distinct offers, and the borrowers separately accepted the offers.

⁶ The borrowers argue that Park Midway could only waive one covenant in the loan agreement. This argument is unpersuasive. The loan agreement states that modifications to the loan agreement, including covenant waivers, must be in writing and signed "by the party against whom enforcement of the . . . waiver . . . is sought." The borrowers do not allege that Park Midway failed to follow the modification procedure. Rather, the borrowers appear to argue that, for the modifications to be valid, Ashbach and ROA had to approve any covenant waivers. As discussed above, they were not parties to the loan agreement; their approval, therefore, was not required.

Moreover, even if the forbearance agreement was invalid, as the borrowers argue, the terms of the loan would then revert back to the original loan agreement. There is no dispute that the borrowers had defaulted on the terms of the underlying loans and that Park Midway was entitled to pursue all remedies available under the original loan agreement. Accordingly, the district court properly entered judgment in favor of Park Midway on its claims against the borrowers.

Affirmed; motion denied.