STATE OF MINNESOTA
IN COURT OF APPEALS
A09-404

Marshall Hinden,
d/b/a Marshall Hinden Contracting, Inc.,
Appellant,

vs.

American Bank of the North,
Respondent.

Filed December 8, 2009
Affirmed
Johnson, Judge

St. Louis County District Court
File No. 69VI-CV-07-700

Matthew K. Begeske, Begeske Law Offices, 713 Board of Trade Building, 301 West First Street, Duluth, MN 55802 (for appellant)

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Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

In 2002, American Bank of the North repossessed property belonging to Marshall Hinden and Marshall Hinden Contracting, Inc., after Hinden defaulted on three loans. In 2007, Hinden sued the bank, alleging claims of breach of contract, promissory estoppel,

wrongful repossession, and conversion. The district court granted summary judgment to the bank. We conclude that Hinden's promissory estoppel claim is barred by the statute of frauds relating to credit agreements and that the bank did not wrongfully repossess or convert Hinden's property. Therefore, we affirm.

FACTS

In April 1998, Hinden borrowed $130,000 from the bank pursuant to a written loan agreement. At the time of the loan, Hinden gave the bank a security interest in all inventory, equipment, accounts receivable, contract rights and general intangibles owned or thereafter acquired by Marshall Hinden Contracting, Inc., as well as a mortgage on real property owned by Hinden and his wife. The security agreement permitted the bank, upon a default, to "declare all unmatured Obligations to be immediately due and payable," to "take possession of any Collateral," and to "sell, lease or otherwise dispose of" the collateral. In October 2000, the bank provided Hinden with two additional loans of $10,000 and $40,000 pursuant to the same terms.

The April 1998 loan required Hinden to make monthly payments of principal and interest. In 2002, Hinden experienced difficulties staying current on the loan payments. According to Hinden, he sought extensions from the bank and also sought to refinance the debt through another lender. Hinden alleges that, throughout the summer of 2002, he kept the bank apprised of his efforts to refinance. He further alleges that an officer of the bank orally informed him that he did not need to make payments to the bank before refinancing.

On September 4, 2002, the bank sent Hinden a written notice of default, which advised him that if the outstanding debt of $131,713.96 "is not paid in full by September 14, 2002 this bank, at its option, may exercise its rights pursuant to the loan agreement, including right of repossession of the collateral, collection action, or sufficient legal steps to obtain payment." On September 13, 2002, Hinden gave the bank a check in the amount of $1,800. On or before September 27, 2002, the bank took possession of some of Hinden's property. On September 27, 2002, the bank sent Hinden written notice of its intent to sell the property that had been seized. On October 9, 2002, the bank delivered a notice of disposition of collateral, informing Hinden that if he wished to redeem the property, he "must pay to the Bank all principal, accrued interest and the Bank's fees and expenses in full on or before October 31, 2002." On December 20, 2002, Hinden redeemed his property by paying the amount due on the loan and additional expenses incurred by the bank.

As far as the district court record reveals, there were no further interactions between the parties until November 2007, when Hinden commenced this action against the bank. Hinden alleged causes of action of breach of contract, promissory estoppel, wrongful repossession, and conversion. In January 2009, the district court granted summary judgment to the bank on each of Hinden's claims. Hinden appeals.

D E C I S I O N

Hinden argues that the district court erred by granting the bank's motion for summary judgment because there are genuine issues of material fact. Although Hinden

pleaded four claims, he argues for reversal with respect to only three claims, having abandoned his claim of breach of contract.

A motion for summary judgment must 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; *see also MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). "On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists, and whether the district court erred in its application of the law." *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009) (quotation omitted).

I. Promissory Estoppel

Hinden first argues that the district court erred by granting summary judgment to the bank on his claim of promissory estoppel. To prevail on a claim of promissory estoppel, a plaintiff must prove that "1) a clear and definite promise was made, 2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and 3) the promise must be enforced to prevent injustice." *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000).

Hinden's claim of promissory estoppel is based on his allegation "that the bank made verbal representations on which he relied that the bank had no actual intent to

exercise their rights of repossession." But the district court did not analyze the elements of promissory estoppel because it concluded that the claim is barred by the statute of frauds relating to credit agreements. The pertinent part of the statute provides, "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." Minn. Stat. § 513.33, subd. 2 (2008). "The plain and unambiguous language of the statute clearly prohibits a claim that a new credit agreement is created unless the agreement is in writing, expresses consideration, sets forth all relevant terms and conditions, and is signed by the creditor and debtor." *Greuling v. Wells Fargo Home Mortgage, Inc.*, 690 N.W.2d 757, 762 (Minn. App. 2005). Accordingly, "claims on agreements falling under section 513.33 fail as a matter of law if the agreement is not in writing." *Id.* at 761-62.

The district court reasoned that section 513.33 bars Hinden's promissory estoppel claim because the alleged statement that the bank would forbear its collection of Hinden's debt would constitute a credit agreement that must be in writing to be enforceable. We agree. The term "credit agreement" is defined by the statute to mean "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." Minn. Stat. § 513.33, subd. 1 (2008). The agreement alleged by Hinden plainly is a "credit agreement" because it is "an agreement to . . . forbear repayment of money." *Id.* As made clear in *Greuling*, a promise to enter into a credit agreement is deemed to be a credit agreement for purposes of section 513.33, subdivision 1. 690 N.W.2d at 761-62.

Thus, Hinden "may not maintain an action on" the alleged promise unless it is "in writing." Minn. Stat. § 513.33, subd. 2. But the alleged promise is not in writing; Hinden's claim is based on alleged oral statements. Therefore, the claim is barred by section 513.33, subdivision 2.[1]

Hinden attempts to distinguish the *Grueling* case by noting that the plaintiff in that case did not establish the elements of promissory estoppel. But that argument fails to address the application of section 513.33. Hinden also relies on *Lunning v. Land O'Lakes*, 303 N.W.2d 452 (Minn. 1980), for the proposition that "[w]hen an application of the Statute [of frauds] will protect, rather than prevent, a fraud, equity requires that the doctrine of equitable estoppel be applied." *Id.* at 457. But *Lunning* was not concerned with section 513.33, which was enacted into law five years after the *Lunning* opinion. *See* 1985 Minn. Laws, ch. 245, § 1 at 784-85. In addition, Hinden has not alleged a claim of equitable estoppel. Furthermore, the *Lunning* court actually held that the plaintiff could *not* rely on a promissory estoppel claim to overcome the statute of frauds that was applicable to that case. 303 N.W.2d at 459.

[1]Hinden's promissory estoppel claim also may be barred by another provision of section 513.33, which provides, "The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2: . . . the 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." Minn. Stat. § 513.33, subd. 3(a)(3) (2008). Neither the bank nor the district court relied on this provision, so we need not consider it.

Thus, the district court correctly concluded that the bank is entitled to summary judgment on Hinden's promissory estoppel claim because the claim is barred by section 513.33, subdivision 2.

II. Wrongful Repossession

Hinden next argues that the district court erred by granting summary judgment on his claim of wrongful repossession. Hinden contends that the bank had a history of accepting late payments from him and "that acceptance of a partial payment in September 2002 meant that the bank was required to provide [him] with additional notice prior to exercising their right of self-help repossession."

"[T]he repeated acceptance of late payments by a creditor who has the contractual right to repossess the property imposes a duty on the creditor to notify the debtor that strict compliance with the contract terms will be required before the creditor can lawfully repossess the collateral." *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 237 (Minn. 1980). If a creditor repeatedly accepts late payments and then fails to give proper notice to a debtor before repossessing the property, the repossession may be found to be wrongful. *Id*. But if a creditor does not accept a late payment after a specified deadline, the creditor is "entitled . . . to repossess the collateral without any further notice." *McNeill v. Dakota County State Bank*, 522 N.W.2d 381, 384 (Minn. App. 1994).

In this case, the bank notified Hinden on September 4, 2002, of its intention to repossess collateral if Hinden did not pay the outstanding balance on the loans within 10 days. This notice clearly stated the consequences of failure to pay the entire debt. Hinden made only a partial payment before September 14, 2002. The bank did not

accept a late payment after the September 14, 2002, deadline. Thus, the bank did not have a duty to provide additional notice to Hinden before repossessing the pledged collateral. *See McNeill*, 522 N.W.2d at 384.

Hinden argues that the bank had a duty to provide additional notice before repossessing because his September 13, 2002, check did not clear until September 26, 2002, after the deadline. This argument fails because the relevant date is the date the check was delivered, not the date on which the check cleared. *See Wayzata Enterprises, Inc. v. Herman*, 268 Minn. 117, 120, 128 N.W.2d 156, 158 (1964) (stating that payment of debt was effective "when the check was given"). In short, the payment consisting of the September 13, 2002, check was not a late payment. In any event, the payment Hinden delivered on September 13 did not cure the default. The bank insisted on *full* payment by that date; Hinden made only a small *partial* payment. The *McNeill* case makes clear that a bank in that situation has no duty to provide additional notice. *See* 522 N.W.2d at 384.

Thus, the district court correctly concluded that the bank is entitled to summary judgment on Hinden's wrongful-repossession claim because the bank did not have a duty to provide additional notice to Hinden before repossessing the pledged collateral.

III. Conversion

Hinden last argues that the district court erred by granting summary judgment on his conversion claim. Conversion is "an act of willful interference with personal property, done without lawful justification by which any person entitled thereto is deprived of use and possession." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)

(quotation omitted). "To make out a prima facie claim for conversion, a party must show it had a right to the use, possession, or ownership of the property converted." *General Cas. Co. v. Mid-Continent Agencies, Inc.*, 485 N.W.2d 147, 149 (Minn. App. 1992), *review denied* (Minn. July 16, 1992).

We have held that the bank's repossession of Hinden's collateral was not wrongful. *See supra* part II. Accordingly, Hinden cannot prove that the bank's repossession was without lawful justification or that he had a right to use, possess, or own the collateral after failing to repay the loans made by the bank. *See DLH*, 566 N.W.2d at 73-74; *General Cas.*, 485 N.W.2d at 150.

Thus, the district court correctly concluded that the bank is entitled to summary judgment on Hinden's conversion claim.

In sum, the district court did not err by granting summary judgment to the bank on each of Hinden's claims.

Affirmed.