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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-300**

Keith Trautman,
Appellant,

vs.

JPMorgan Chase Bank, et al.,
Respondents.

**Filed August 13, 2012
Affirmed
Rodenberg, Judge**

Dakota County District Court
File No. 19HACV113491

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Considered and decided by Rodenberg, Presiding Judge; Stauber, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal from summary judgment in this mortgage-modification dispute,
appellant-mortgagor argues that (1) the federal Home Affordable Modification Program
does not preempt mortgagor's state and common-law claims; (2) the district court erred

in dismissing appellant's breach-of-contract claims, which were premised upon the parties' communications regarding a Trial Payment Plan (TPP); (3) the district court erred in dismissing appellant's fraud, negligent misrepresentation, and promissory estoppel claims; and (4) the district court erred in dismissing appellant's fraud-based claims for failure to plead those claims with particularity as required by Minn. R. Civ. P. 9.02. We affirm.

FACTS

This action arises from communications and dealings between the parties after the creation of the Home Affordable Modification Program (HAMP), designed to encourage loan servicers and investors to modify certain mortgages in order to reduce the number of home foreclosures. HAMP was announced by President Barack Obama on February 18, 2009.

The HAMP mortgage-modification process is a two-step process: the first step involves an exchange of information to determine whether a borrower is entitled to a modification of his or her mortgage and the second step involves the actual mortgage modification and attendant documentation.

The parties here agree that appellant's mortgage was never modified; but if it had been modified, the modification would have occurred during the second stage. Appellant claims that a contract was created during the parties' communications during the first step of the HAMP process.

In the first step, as HAMP is designed, the mortgage servicer provides the borrower with a TPP for the borrower to execute and return with a signed affidavit of

hardship, income verification documents, and the first of three monthly “trial period payments” in a designated preliminary amount. The servicer then uses the documentation provided by the borrower to determine whether the borrower is eligible for a HAMP modification. If the borrower is eligible for a mortgage modification, then the TPP is signed by the servicer and a copy of the executed document is returned to the borrower. If the borrower is deemed ineligible for a mortgage modification, the servicer is to notify the borrower in writing that the borrower is ineligible.

After the servicer provides an eligible borrower with a signed TPP, if the financial situation of the borrower does not change and if the borrower makes the remaining trial-period payments on time, the parties move to the second step of the modification process. In the second step, the servicer uses the information supplied by the borrower to draft and execute a mortgage-modification agreement which is then sent to the borrower for the borrower’s signature.

In June 2004, appellant Keith Trautman and his wife purchased a home in Lakeville, Minnesota. The purchase was financed through a loan secured by a promissory note and mortgage in favor of Washington Mutual Bank. Respondent JPMorgan Chase Bank N.A. acquired the note and mortgage on September 25, 2008.¹

Appellant began to experience financial difficulties in 2006, and defaulted on his mortgage around October 2008. On July 24, 2009, appellant received a cover letter and TPP from respondent. Respondent had not signed the TPP. The TPP received by

¹ Although identified in the complaint as a separate party, it appears that Chase Home Finance LLC has been merged into JPMorgan Chase Bank N.A.

appellant stated that “[t]his Plan will not take effect unless and until both I and the Lender sign it and Lender provides me with a copy of this Plan with the Lender’s signature.”

Appellant and his wife executed the TPP and returned it to respondent on July 30, 2009. Appellant then made all of the trial period payments on time. In addition, appellant made five additional monthly payments in the amount indicated by respondent when it sent the TPP to appellant. Appellant made these payments while waiting for respondent to inform him as to whether his loan-modification request was approved. During this period, appellant contacted unidentified representatives of the respondent on a number of occasions seeking to determine the status of his modification request. Each time, appellant was informed that a decision had not yet been made.

It is undisputed that respondent never executed and returned a signed copy of the TPP to appellant, despite accepting these payments from appellant. In March 2010, respondent notified appellant that he had been denied a HAMP modification.

On or about April 6, 2010, respondent assigned the note and mortgage to Deutsche Bank National Trust Company, which initiated foreclosure proceedings. A sheriff’s foreclosure sale was eventually held, and the redemption period expired without appellant redeeming the property.

Appellant brought the present action seeking a declaratory judgment and injunctive relief, based on his claim that the parties’ communication and dealings created a contract to modify the terms of the promissory note and mortgage. In addition, the complaint sought damages for breach of contract, breach of mortgagee duty, fraud, negligent misrepresentation, promissory estoppel, and unjust enrichment.

Respondent moved for summary judgment, which the district court granted on January 3, 2012.

Appellant, in a letter dated January 17, 2012, requested leave pursuant to Minn. R. Gen. Pract. 115.11 to file a motion to reconsider, which request the district court denied. Appellant had attached to his request a document that he claimed demonstrated respondent's fraudulent intent.

This appeal follows.

D E C I S I O N

I.

Appellant's first assignment of error is that the district court ruled that HAMP preempted or barred appellant's state law claims. The district court did not rule as appellant contends. Instead, the district court stated that HAMP itself "does not create a private right of action for a borrower." In its memorandum, the district court wrote: "HAMP does not preempt state law claims" nor does it "immunize servicers from lawsuits arising from actions taken in connection with HAMP that . . . violat[e] existing state and common laws." The district court then used Minnesota law to analyze the merits of appellant's claims.²

Because the district court did not make the ruling complained of, appellant's first assignment of error fails to articulate a basis for reversing the district court. *Cf. State v. Reed*, 737 N.W.2d 572, 589 (Minn. 2007) (noting that defendant "c[ould not] challenge

² This issue is addressed at length in appellant's brief but, in his reply brief, appellant agrees that this appeal and his claims "should rise and fall upon state law alone."

the district court’s ruling on the admissibility of the conviction, as the court made no such ruling.”)

II.

Appellant next argues that the district court erred in holding as a matter of law that the parties’ communications regarding the TPP did not create an enforceable contract.

On appeal from summary judgment, this court reviews the record to determine (1) whether there is a genuine issue of material fact and (2) whether the district court erred in its application of the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). This review is conducted de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

Summary judgment is appropriate where “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 evidence is viewed in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The existence and terms of a contract are questions of fact to be determined by the fact-finder. *TNT Props., Ltd. v. Tri-Star Developers LLC*, 677 N.W.2d 94, 101 (Minn. App. 2004). However, where the relevant facts are not in dispute, the existence of a contract is a question of law and is reviewed de novo. *Id.*

The long-standing rule in Minnesota is that “[w]here the parties make the reduction of the agreement to writing *and its signature by them* a condition precedent to

its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon.” *Lamoreaux v. Weisman*, 136 Minn. 207, 210, 161 N.W. 504, 506 (1917) (quotation omitted) (emphasis added); *accord Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122–23 (Minn. 1980); *Massee v. Gibbs*, 169 Minn. 100, 103, 210 N.W. 872, 873–74 (1926); *TNT Props., Ltd.*, 677 N.W.2d at 100.

In *Massee*, the plaintiff-mortgagor and the defendant-mortgagee were in negotiations by mail to renew a mortgage on land the defendant was selling to plaintiff under a contract for deed. 169 Minn. at 101, 210 N.W. at 872–73. After much correspondence between the parties, the plaintiff forwarded a draft contract to the defendant. *Id.* The defendant returned the contract unsigned with suggested changes, and instructed the plaintiff to prepare and execute two copies of the modified contract and mail them to the defendant. *Id.* at 101–02, 210 N.W. at 873. The plaintiff complied with this request, and the defendant acknowledged receipt of the letter and copies of the contract, but never signed the contract. *Id.* at 102, 210 N.W. at 873.

The supreme court held that no contract was created, noting that the correspondence between the parties made it clear that “defendant did not intend to be bound, and never expressed his assent to become bound, without the formal execution of the contract for deed.” *Id.* at 102–05, 210 N.W. at 873–74. As the supreme court explained:

The principle involved is clear. One may condition his entry into contract relations as he sees fit, resorting even to absurdity if he chooses. So, although there be complete

agreement on terms, if one expresses the intention not to be bound until the signing of a formal contract, there is no contract if that condition is not fulfilled. Until it is fulfilled, the matter remains in negotiation, and either party may withdraw.

Id. at 104, 210 N.W. at 874.

The relevant facts in the present case on this issue are very similar to the facts in *Massee*. Here, the TPP instructed appellant to sign and return two copies of the TPP to respondent and stated that if appellant was eligible for a HAMP mortgage modification, then respondent would sign and return a copy of the TPP to appellant. Appellant complied with this request. Respondent, upon being contacted by appellant, acknowledged receipt of the TPP. However, respondent never signed the TPP, nor did it notify appellant promptly that he did not qualify for a modification.

The TPP provided that it “w[ould] not take effect unless and until both [appellant] and the Lender sign it and Lender provides [appellant] with a copy of this Plan with the Lender’s signature.” The TPP therefore expressly established, as a condition precedent to its effectiveness, the requirement that respondent provide a copy of the TPP to appellant with respondent’s signature. That respondent did not do so is undisputed and dispositive.

The district court did not err in concluding as a matter of law that there was no contract.

Wigod v. Wells Fargo Bank, N.A., upon which appellant relies, is distinguishable. *See generally* 673 F.3d 547, 554–55 (7th Cir. 2012) (reversing the summary judgment dismissal of a complaint arising from a TPP and alleging breach of contract, promissory estoppel, fraudulent misrepresentation, and Illinois statutory claims). The lender in

Wigod executed and provided a signed TPP to the borrower. *Id.* at 558, 562. *Wigod* involved a *signed* TPP and was decided under Illinois law. The question of whether Minnesota courts would render the same result as did *Wigod* in a case where the lender has executed the TPP is not before us.

Appellant also relies on *Rural Am. Bank of Greenwald v. Herickhoff* for the proposition that the respondent's signature was not a condition precedent to the effectiveness of the TPP because the TPP communication came to appellant on respondent's letterhead. *See generally* 485 N.W.2d 702, 707 (Minn. 1992) (holding that where a contract "was drafted and typed by an officer of the Bank on the Bank's letterhead stationery," and "[t]he letterhead included the names of the Bank officers; two of whom were present at . . . loan execution," and "[t]he Loan Agreement referred to other documents that were executed in conjunction with [it]," and "[i]ts terms were presented to the Loan Committee and were part of the . . . loan file," the bank intended to be bound and the letterhead was the bank's signature for purposes of Minn. Stat. § 513.33 (1990 & Supp. 1991)). However, the result in *Herickhoff* was based on the supreme court's interpretation of Minn. Stat. § 513.33. *See id.* at 706 (interpreting the meaning of "signed" under Minn. Stat. § 513.33, which requires that a "credit agreement" be in writing and signed by the creditor and debtor). That statutory provision is not at issue here, because the signature requirement here was supplied by the terms of the TPP itself. Since the requirement of a signature was expressly designated by respondent as a condition precedent to the creation of a contract, a fact not present in *Herickhoff*, the *Herickhoff* analysis is neither necessary nor appropriate.

The district court did not err in holding as a matter of law that the parties' communications with respect to the TPP did not create a contract.

III.

Appellant argues that the district court should not have granted summary judgment with respect to his claims of fraud, negligent misrepresentation, and promissory estoppel because a document that he attached to his letter requesting leave to file a motion for reconsideration allegedly demonstrated that respondent knew at the time it sent appellant the TPP that it had no intention of modifying appellant's mortgage.

We review a district court's denial of a motion to reconsider for an abuse of discretion. *In re Welfare of S.M.E.*, 725 N.W.2d 740, 743 (Minn. 2007) (noting that motions to reconsider "are considered only at the district court's discretion"). Furthermore, "[m]otions for reconsideration . . . will not be allowed to supplement the record on appeal." *Am. Bank of St. Paul v. Coating Specialties, Inc.*, 787 N.W.2d 202, 206 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010); *see also* Minn. R. Gen. Pract. 115.11 1997 advisory comm. cmt. ("Motions for reconsideration will not be allowed to 'expand' or 'supplement' the record on appeal.").

Here, the district court did not abuse its discretion in denying appellant's request for leave to file a motion for reconsideration. Therefore, the document relied on by appellant in making this argument is not part of the record on appeal. It does not provide a basis for reversing the district court's determination that appellant had not presented

sufficient evidence to survive a motion for summary judgment on his claims of fraud, negligent misrepresentation, and promissory estoppel.³

IV.

Appellant contends that the district court erred by concluding that he failed to plead his allegations of fraud and negligent misrepresentation with particularity. The construction and application of a procedural rule is a question of law, which this court reviews de novo. *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 786 (Minn. 2009).

Under the Minnesota Rules of Civil Procedure, a party alleging fraud-related claims must state “the circumstances constituting fraud . . . with particularity.” Minn. R. Civ. P. 9.02. A party satisfies this requirement when “the ultimate facts are alleged.” *In re Estate of Williams*, 254 Minn. 272, 283, 95 N.W.2d 91, 100 (1959). This court has recently explained that satisfying the particularity requirement requires identifying the “who, what, when, where, and how: the first paragraph of any newspaper story.” *Baker*

³ We note in passing that, even if this court were to substantively consider the document attached to appellant’s request for leave to file a motion for reconsideration, the meaning and significance of the proffered document is not clear from the face of the document. Appellant contends that the document, dated prior to the mailing of the TPP, demonstrates that he was not going to be entitled to a mortgage modification based on the then-available information. Even if it had been a part of the record on appeal, it is not at all clear that this document would have provided a basis for overturning the district court’s well-reasoned analysis on these claims. The record is clear that, at the time the TPP was sent to appellant, respondent sought more information to determine appellant’s eligibility for a mortgage modification. Appellant agrees that he supplied the requested additional information. Respondent was slow in reacting to the information supplied, to be sure, but there is nothing contained in the attachment dated prior to the TPP indicating that the TPP was being sent with knowledge that appellant would ultimately not be eligible for a mortgage modification.

v. Best Buy Stores, LP, 812 N.W.2d 177, 184 (Minn. App. 2012) (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997)), *review denied* (Minn. Apr. 25 2012).

Appellant’s fraud claim alleged that “Defendant represented to Plaintiff that Plaintiff was permanently enrolled in the modification following timely completion of the trial plan and submission of Plaintiff’s modification payments, with the intent that Plaintiff relied upon said representation.” Appellant’s negligent misrepresentation claim incorporates the same alleged misrepresentation(s).

The crux of both claims appears to be derived from the following allegations:

29. On or around July 24, 2009 Defendant sent Plaintiff written correspondence informing Plaintiff that he qualified for a modification trial payment plan. . . .

30. *The plan* stated that Plaintiff was required to make three monthly modified payments on his mortgage directly to Defendant.

31. *Defendant informed Plaintiff that after Plaintiff successfully completed paying his three trial payments to Defendant; Defendant [sic] would be approved for a permanent modification.*

(Emphases added.)

The allegation in paragraph 31 is the core of plaintiff’s fraud and misrepresentation claim. It does not satisfy the particularity requirement. While paragraph 31 recites the “what” of the fraudulent act—that appellant was guaranteed a loan modification if he made the three trial period payments—it does not identify the “who,” the “where,” the “when,” or the “how.”

The district court found, and this court agrees, that the particularity requirement is especially significant here because the misleading statements that respondent's representatives are alleged to have made are not present in, and in significant respects are inconsistent with, respondent's written communications with appellant. For example, all of the documentary evidence produced by appellant clearly expresses that the TPP would not be effective unless and until it was signed by respondent. Appellant's complaint does not identify who "informed" appellant otherwise and fails to identify how or when any such communication was made to him.

Appellant alleges that the respondent "informed" him that he "qualified for a modification trial payment plan," but respondent, as a company, is an artificial person and can only act through its agents and officers. *Cf. Rommel v. New Brunswick Fire Ins. Co.*, 214 Minn. 251, 259–60, 8 N.W.2d 28, 33 (1943) (noting that insurance companies generally act through their agents and employees). Paragraph 31 does not identify, even generally, the individual who made the alleged statement to him.

While on appeal, appellant seems to argue that the representations alleged in paragraph 31 were made in the TPP itself, this is not apparent from the face of the complaint. Indeed, if this had been appellant's intent then he could have specifically identified the *plan* as the speaker in paragraph 31, just as he did in paragraph 30.

Instead, the fraud allegations of the complaint are ambiguous and imprecise. It is unclear whether appellant claims that some or all of the false representations were made in the plan itself, in correspondence that accompanied the plan, or by a representative of

the respondent over telephonic or electronic communications sometime after appellant received the plan.

These are precisely the deficiencies identified by the district court, which stated that “the claims fail to specify the individual(s) that made the misrepresentations as well as when and where they were made.” The district court did not err by holding that appellant had not stated his fraud-related allegations with particularity.

The district court did not err in granting respondent’s motion for summary judgment. Under the facts of case, the parties’ communications did not create a contract, as the original written communication to appellant specifically provided that no contract would be created unless and until respondent executed the TPP, which respondent never did. The district court did not abuse its discretion in denying appellant’s request for leave to file a motion for reconsideration. Appellant did not plead his fraud claim with sufficient particularity, and appellant’s other arguments are not properly before this court.

Affirmed.