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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A08-0463

A08-0700

Kurt Donaldson, et al.,
Appellants,

vs.

Drake Bank, et al.,
Respondents,

Partners Plus, et al.,
Respondents.

Filed February 24, 2009

Affirmed

Bjorkman, Judge

Ramsey County District Court
File No. 62-CV-07-1344

Michael A. Fondungallah, Fondungallah Kigham & Essien LLC, 2499 Rice Street, Suite 236, St. Paul, MN 55113; and

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Garth G. Gavenda, T. Chris Stewart, Anastasi & Associates, P.A., 14985 60th Street North, Stillwater, MN 55082 (for respondents Drake Bank and Plato Holdings, Inc.)

Paul L. Ratelle, Fabyanske, Westra, Hart & Thomson, P.A., 800 LaSalle Avenue, Suite 1900, Minneapolis, MN 55402 (for respondents Partners Plus and Principal Resource Management Team)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellants challenge the district court's grant of partial summary judgment and the subsequent award of attorney fees to respondent bank. We affirm.

FACTS

Appellant Kurt Donaldson is the owner of appellant Donaldson Chemical Distribution, Inc. (Donaldson Chemical). In September 2004, Donaldson Chemical obtained a Small Business Administration (SBA) loan from respondent Drake Bank to expand its business. This loan was secured by a perfected interest in the assets of Donaldson Chemical and an unconditional guarantee from Donaldson. In April 2005, Donaldson Chemical obtained a second SBA loan from Drake Bank. This second loan was secured in the same manner.

Because Donaldson found it difficult to sell the hair-care products he manufactured while operating as Donaldson Chemical, he incorporated appellant K.don Hair Technology, LLC (K.don) in July 2005. Donaldson subsequently negotiated with various retailers to establish contracts for the sale of K.don's products. To fund the expansion that Donaldson believed was necessary to support these new contracts, Donaldson sought another loan from Drake Bank. The parties discussed the loan request, but in December 2005 Drake Bank informed Donaldson that it would not provide additional financing.

Around the same time, Drake Bank concluded that Donaldson Chemical had transferred the hair-care-production equipment and other collateral for the two SBA loans from Donaldson Chemical to K.don, thereby committing an act of default under the terms of the loan agreements. Rather than pursuing one of the default remedies listed in the loan agreements, Drake Bank negotiated a forbearance agreement with Donaldson and his companies, which they signed in April 2006. The agreement contains a release provision under which the Donaldson entities released all claims “occurring and/or arising from transactions entered into with the Lender.”

In July 2007, as they finished paying off the SBA loans, Donaldson and his companies (appellants) initiated this lawsuit against Drake Bank and Drake Bank’s parent company, Plato Holdings, Inc. Appellants alleged, among other things, that Drake Bank failed to honor its oral promise to lend additional funds. The amended complaint alleged “breach of the covenant of good faith and fair dealing; negligent misrepresentation; intentional misrepresentation; interference with contract/business relation; breach of fiduciary duty; prima facie tort; and intentional infliction of emotional distress.”¹ Drake Bank and Plato Holdings interposed requests for admission to which appellants did not timely respond. Drake Bank and Plato Holdings moved for dismissal or, in the alternative, summary judgment, and for sanctions against appellants pursuant to Minn. R. Civ. P. 11.

¹ In the same complaint, appellants also asserted claims against respondents Partners Plus and Principal Resource Management Team, the name under which Partners Plus was doing business. These claims are still pending and are not at issue in this appeal.

The district court granted Drake Bank's motion for summary judgment, concluding that appellants' claims were either barred by Minnesota law or so lacking in evidentiary support as to be meritless. The district court found that appellants did not timely and properly respond to the requests for admission, so the district court deemed them to be admitted. The district court also dismissed Plato Holdings from the action because the allegations against Drake Bank were insufficient to maintain a cause of action against Plato Holdings, but denied the sanction motion. Appellants filed a notice of appeal challenging the summary judgment.² The district court subsequently granted Drake Bank's request for attorney fees pursuant to the terms of the forbearance agreement. Donaldson and his companies appealed the attorney-fee award. We consolidated the two appeals.

D E C I S I O N

I. Summary judgment

On appeal from summary judgment, this court determines whether genuine issues of material fact exist and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). We will affirm a district court's grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

² Appellants do not challenge the district court's decision to dismiss Plato Holdings from the action.

Summary judgment is appropriate “if 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.

Drake Bank contends that all of appellants’ claims are barred by the forbearance agreement. We agree. All three appellants expressly agreed to the following provision:

Release of Claims. In consideration of this Agreement and Lender’s agreement to forbear under the terms stated herein, Donaldson [Chemical], K.don and [Donaldson], for and on behalf of themselves and their respective heirs, successors, representatives and assigns, do hereby agree to, and do hereby, release, acquit and forever discharge the Lender and its successors and assigns of, and from, any and all manners of action or actions, suits, claims or charges occurring and/or arising from transactions entered into with the Lender prior to the effective date of this Agreement, whether known or unknown, liquidated or unliquidated, fixed, contingent, direct or indirect, which Donaldson [Chemical], K.don and [Donaldson] may have against the Lender.

Appellants do not contend that the release terms are vague or dispute the fact that their claims fall within the scope of the release. More importantly, by failing to timely and properly respond to Drake Bank’s requests for admission, appellants admitted that “the issues alleged in the Amended Complaint were previously resolved pursuant to the terms and conditions set forth in the Forbearance Agreement and Loan Documents,” and that “the issues alleged in the Amended Complaint were previously resolved pursuant to [Drake Bank’s] fulfillment of all of its obligations set forth in the forbearance agreement.” Appellants do not challenge the district court’s ruling that these facts are deemed admitted.

We will affirm summary judgment if it can be sustained on any ground, even one the district court did not address. *Winkler*, 539 N.W.2d at 827. Here, the district court did not expressly grant summary judgment based on the release provision of the forbearance agreement, but we conclude that the release is dispositive. Based on appellants' admissions and the terms of the forbearance agreement, appellants' claims fail as a matter of law. Accordingly, the district court properly granted Drake Bank summary judgment.³

II. Attorney fees

Appellants also argue that the district court erred by awarding Drake Bank attorney fees. Generally, attorney fees are not awarded without a contractual or statutory basis. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982). We will not reverse a district court's award of attorney fees absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

Appellants acknowledge that the forbearance agreement requires them to reimburse Drake Bank for its attorney fees and expenses, but nonetheless contend that the forbearance agreement is invalid because they signed it under duress. But the fact that appellants were in a difficult financial situation at the time they entered into the forbearance agreement and that Drake Bank was threatening legal action or repossession of collateral—actions that appellants acknowledge Drake Bank was entitled to take in the event of a default—do not establish that appellants were under duress. *See Wise v.*

³ Because the forbearance agreement supports the grant of summary judgment, we decline to address appellants' other arguments regarding summary judgment.

Midtown Motors, Inc., 231 Minn. 46, 52, 42 N.W.2d 404, 407 (1950) (stating that “a threat to bring an action to enforce a lawful demand . . . does not constitute duress”). Because appellants otherwise acknowledge that the forbearance agreement supports the attorney-fee award and do not contest any other aspect of the award, we affirm the district court’s award of attorney fees to Drake Bank.

Affirmed.