STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1871

Douglas W. Becker, et al.,
Appellants,

vs.

Alliance Bank, defendant, counterclaimant and third party plaintiff,
Respondent,

vs.

Neil Boderman, third party defendant,
Appellant.

Filed July 27, 2010
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-07-14748

Matthew L. Fling, Edina, Minnesota (for appellants)

David R. Marshall, Leah C. Janus, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant BB VII, LLC, a limited-liability company, challenges the district court's grant of summary judgment in favor of respondent on its breach-of-contract claim, arguing in the alternative that the statute of frauds, Minn. Stat. §§ 513.04, .05, and .33 (2008), did not apply or that if it did the parties' supplemental closing agreement was a writing sufficient to satisfy the statute of frauds. Because the statute of frauds applied, and because appellant litigated this claim in district court based on an alleged oral agreement, the district court did not err in granting summary judgment in favor of respondent on appellant's breach-of-contract claim. Appellants challenge the district court's entry of judgment in the amount of $89,750 on respondent's unjust-enrichment claim, arguing that respondent failed to prove it was damaged in that amount. Because no material facts were in dispute and the district court correctly applied the law, the district court did not err in entering judgment in that amount in favor of respondent. We affirm.

FACTS

In the mid-1980s, appellant Neil Boderman had an ownership interest in and was the decision maker of Priordale Mall Investors (PMI), and in 1984 PMI purchased the Priordale Mall (mall) in the City of Prior Lake (city). At the time of the purchase, the mall was encumbered by a mortgage (initial mortgage). In order to fund improvements to the mall, in 1985 PMI obtained a promissory note from the city that was payable to respondent Alliance Bank's predecessor in interest. A number of investors including

plaintiffs Douglas and Donna Becker, Perry Devine, Gary Mac Halec, and Larry Norder (collectively, participants) signed participation agreements with Alliance Bank and received pro rata participation units in the note. The participants' investment was used to fund an improvement loan to PMI. PMI's repayment obligations under the improvement loan were secured by a mortgage on the mall (improvement-loan mortgage), which was subordinate to the initial mortgage.

In 2001, PMI went into receivership because it defaulted on its debts, including its obligations secured by the initial mortgage and its obligations under the loan agreement secured by the improvement-loan mortgage. The redemption period on the initial mortgage was set to expire on March 17, 2003, which would have extinguished all junior liens on the mall, including the improvement-loan mortgage, and the participants would have lost the ability to recover their investments.

In January 2003, PMI tried to sell the mall, but the sale fell through. PMI subsequently informed Alliance Bank of another buyer, Bealmake Partners LLC (Bealmake), contingent on Alliance Bank financing the purchase. Alliance Bank agreed and made a $2 million loan to Bealmake on March 11, 2003. As security for the loan, Alliance Bank received a mortgage on the mall property.

Appellant BB VII, LLC is a limited-liability company engaged in the business of real-estate development. It is wholly owned by Boderman's wife, and Boderman was the chief manager. BB VII owned a mortgage on a portion of the land that PMI sold to Bealmake. BB VII released its mortgage (BB VII mortgage) in exchange for a mortgage on a parcel of residual property that was not included in the sale (residual mortgage). BB

VII gave a satisfaction of its mortgage on the land PMI sold to Bealmake to Alliance Bank, allegedly with the understanding that Alliance Bank would not record the BB VII satisfaction until BB VII received the residual mortgage. Alliance Bank recorded the BB VII satisfaction and allegedly wrongfully extinguished BB VII's residual mortgage.

Before the sale of the mall to Bealmake, Alliance Bank loaned $200,000 to BB VII, which Boderman personally guaranteed. The loan was later increased to $225,000. BB VII defaulted on this loan, and in turn Boderman became personally liable to Alliance Bank. Darrell Mullerleile, then Alliance Bank's president and a longstanding business associate of Boderman, stole hundreds of thousands of dollars from Alliance Bank and used some of that money to make payments in December 2004 and May 2005 on Alliance Bank's loan to BB VII. Boderman eventually became aware of this, but did not inform Alliance Bank.

In June 2007, the participants and BB VII jointly sued Alliance Bank. The participants asserted claims of breach of contract, breach of fiduciary duty, and fraud. BB VII asserted claims of breach of contract and fraudulent misrepresentation. Alliance Bank filed an answer that included counterclaims against BB VII and third-party claims against Boderman. Alliance Bank asserted a breach-of-contract claim against Boderman, a conspiracy-to-defraud claim against BB VII and Boderman, an unjust-enrichment claim against BB VII and Boderman, and sought contractual attorney fees from Boderman.

In January 2008, all parties filed cross-motions for summary judgment. In June 2009, the district court issued an order denying all of the participants' and BB VII's motions; granting summary judgment on Alliance Bank's unjust-enrichment claim

against BB VII; granting Alliance Bank's breach-of-contract, unjust-enrichment, and attorney-fees claims against Boderman; dismissing Alliance Bank's conspiracy-to-defraud claim against BB VII and Boderman; and denying all other relief. Shortly thereafter, the district court issued an order amending the judgment to include $89,750 in damages against BB VII and Boderman.

BB VII and Boderman now appeal.[1]

D E C I S I O N

Summary judgment is appropriate 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 judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal from summary judgment, we must determine whether there are any genuine issues of material fact, and whether the lower court erred in its application of the law." *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). But to avoid summary judgment, the nonmoving party must present evidence that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

[1] Although the participants are listed in the caption as appellants, counsel has clarified that this appeal is taken only on behalf of BB VII and Boderman.

This court must disregard any harmless error. Minn. R. Civ. P. 61. We will affirm a district court's grant of summary judgment if it can be sustained on any grounds. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996). Error is never presumed on appeal and must be shown by the party relying on the alleged error. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. 1997).

I. The district court did not err in granting summary judgment in favor of Alliance Bank on BB VII's breach-of-contract claims.

The district court granted summary judgment on BB VII's breach-of-contract claim based on (1) operation of the statute of frauds and (2) a failure of consideration. We first consider the district court's ruling that this claim was barred by the statute of frauds.

On appeal, BB VII argues that the supplemental closing agreement is a writing sufficient to satisfy the statute of frauds. In the complaint, BB VII claimed that Alliance Bank wrongfully recorded the satisfaction of BB VII's mortgage, thereby breaching the agreement by which BB VII gave possession of the satisfaction to Alliance Bank. Alliance Bank's memorandum of law in support of its motion for summary judgment asserted that BB VII could not maintain its breach-of-contract claim because it "failed to identify a contract that was allegedly breached." BB VII submitted a responsive memorandum of law in which it specifically responded to this allegation, asserting that its breach-of-contract claim was based on the "oral representations" that Alliance Bank made when BB VII gave its signed mortgage satisfaction to Alliance Bank's president.

Thus, BB VII's argument to the district court was that the contract allegedly breached by Alliance Bank was an oral, rather than written, contract. Accordingly, we will not consider arguments based on the supplemental closing agreement for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts may not consider issues not presented to and decided by the district court, and that a party may not shift theories on appeal).

Under Minnesota law, a transaction assigning any interest in land must be made in writing. Minn. Stat. § 513.04. A contract for the sale of any interest in land is void unless the contract is in writing. Minn. Stat. § 513.05. The statutory reference to interests in land "is broad enough to include any right, title, estate in, or lien upon, real estate." *Franklin Auto Body v. Wicker*, 414 N.W.2d 509, 512 (Minn. App. 1987) (quotation omitted). Similarly, a debtor may only maintain an action on a credit agreement if 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. A credit agreement includes "an agreement to lend . . . money . . . or to make any other financial accommodation." *Id.*, subd. 1(1). This section has "broad application." *BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 902 (Minn. App. 2010), *review denied* (Minn. May 18, 2010). BB VII does not dispute that the alleged contract on which it relies embraces an interest in land or is a credit agreement. Because the transaction involved BB VII giving up a mortgage on real estate in exchange for a lien on a residual parcel of real property and a loan from Alliance Bank, sections 513.04, 513.05, and 513.33 all apply to the alleged agreement.

BB VII alternatively contends that the doctrine of part performance removes the agreement from the statute of frauds. BB VII quotes the supreme court's statement in *Burke v. Fine* that "where [a] plaintiff shows that his acts of part performance in reliance upon the contract have so altered his position that he will incur unjust and irreparable injury in the event that [the] defendant is permitted to rely on the statute of frauds," an oral contract may be taken out of the statute of frauds in an equitable action for specific performance. 236 Minn. 52, 55, 51 N.W.2d 818, 820 (1952). We recently observed that "the law has . . . developed to allow part performance to remove a contract from the purview of the statute of frauds." *Starlite Ltd. P'ship v. Landry's Rests., Inc.*, 780 N.W.2d 396, 399-400 (Minn. App. 2010). But as Alliance Bank correctly points out, BB VII did not seek specific performance and did not make a part-performance argument in district court. Indeed, BB VII did not seek *any* equitable remedy. Further, BB VII does not explain what its "acts of part performance" were or what "irreparable injury" it has suffered or will suffer, and it makes no attempt to show how *Burke* applies to the facts of this case. BB VII's reliance on *Burke* therefore fails to show reversible error. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to obtain reversal, an appealing party bears the burden of demonstrating both error and prejudice); *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (claims lacking any argument or analysis are waived unless prejudicial error is obvious on mere inspection); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by analysis).

Because the statute of frauds defeated BB VII's claim that Alliance Bank breached an oral agreement, the district court did not err in granting summary judgment in favor of Alliance Bank on BB VII's breach-of-contract claim. We therefore need not consider the district court's alternative holding that the claim failed for lack of consideration.

II. The district court did not err in granting judgment in the amount of $89,750 against BB VII and Boderman on Alliance Bank's unjust-enrichment claim.

BB VII and Boderman argue that the district court erred in granting judgment against them in the amount of $89,750 on Alliance Bank's unjust-enrichment claim because the evidence created a question of material fact of whether Alliance Bank was injured or damaged. As counsel pointed out at oral argument on appeal, the parties' cross-motions for summary judgment imply that no material facts were in dispute. *See Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993) ("The parties themselves, in their cross-motions for summary judgment, have tacitly agreed that there exist no genuine issues of material fact and that the matter could be resolved by reference to [the relevant materials in the record].").

The only law cited by BB VII and Boderman with respect to this issue is *Holman v. CPT Corp.*, which states:

> A claim for unjust enrichment does not lie simply because one party benefits from the actions of another; rather, the term "unjust enrichment" is used in the sense that the benefit has been gained illegally or unlawfully. An action for unjust enrichment may be founded upon failure of consideration, fraud, or mistake, or situations where it would be morally wrong for one party to enrich himself at the expense of another.

457 N.W.2d 740, 745 (Minn. App. 1990) (citation and quotation omitted), *review denied* (Minn. Sept. 20, 1990). BB VII and Boderman appear to be arguing that recovery on an unjust-enrichment claim is based on the loss incurred by the claimant. But under Minnesota law, "recovery for unjust enrichment is based upon what the person enriched has received rather than what the opposing party has lost." *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984), *review denied* (Minn. Nov. 8, 1984). Thus, Alliance Bank's recovery is properly based on what BB VII and Boderman gained through their wrongful acts and not the amount in which the bank was "damaged" by their actions.

Boderman conceded in district court, and does not dispute on appeal, that $89,750 was the amount of money stolen by Mullerleile that was paid toward Alliance Bank's loan to BB VII. Boderman's argument in district court was that Mullerleile later paid restitution to Alliance Bank, and that therefore Alliance Bank was not damaged in that amount. The undisputed facts establish that the loan payment to Alliance Bank from BB VII and Boderman was made with the funds that Mullerleile had embezzled from Alliance Bank. BB VII and Boderman do not challenge the district court's finding that Boderman became aware of Mullerleile's theft and did not take any steps to notify Alliance Bank of the misapplication of funds.

An action for unjust enrichment may be maintained in "situations where it would be morally wrong for one party to enrich himself at the expense of another." *Id.* There is no dispute that it was morally wrong for BB VII and Boderman to enrich themselves based on Mullerleile's theft. Again, the measure of recovery is the amount in which BB

VII and Boderman were unjustly enriched and not the amount in which Alliance Bank was harmed. *See id.* Thus, BB VII and Boderman have failed to show any error by the district court, and we conclude that the district court did not err as a matter of law in entering judgment in the amount of $89,750.

Affirmed.