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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2270**

Connie L. Gretsche,
Appellant,

vs.

Vantium Capital, Inc.,
d/b/a Acqura Loan Services,
Respondent.

**Filed June 17, 2013
Affirmed; motion granted
Worke, Judge**

Hennepin County District Court
File No. 27-CV-11-16871

Timothy L. Thompson, Housing Preservation Project, St. Paul, Minnesota;

Richard J. Fuller, Bert Black, Schaefer Law Firm, LLC, Minneapolis, Minnesota; and

Randall Smith, St. Paul, Minnesota (for appellant)

Michael J. Steinlage, Paul A. Sand, Larson King, LLP, St. Paul, Minnesota (for
respondent)

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's grant of summary judgment, arguing that
the district court erred by dismissing her claims under Minn. Stat. § 58.18, subd. 1

(2012), for violations of Minn. Stat. § 58.13 (2012), and Minn. Stat. § 332.37(19) (2012), and for negligence per se. We affirm.

FACTS

Appellant Connie L. Gretsche owned a home in Minneapolis. In 2006, appellant entered into a mortgage with Aegis Lending Corporation. This loan was sold to Pacifica L. Nineteen, LLC, which contracted with CitiMortgage, Inc., to service the mortgage. In 2008, appellant lost her job; she contacted CitiMortgage, which gave her a loan extension agreement, under the terms of which appellant agreed to make reduced payments.

In April 2010, appellant alleged that CitiMortgage informed her that she “had been granted forbearance and payment restructuring under the Home Affordable Unemployment Program (UP)””; her payment was reduced again to \$300 per month for three months. She subsequently paid \$300 in May, June, and July, 2010. The payments were accepted.

In 2009, respondent Vantium Capital, Inc., d/b/a Acqura Loan Services, agreed to participate in the Home Affordable Mortgage Program (HAMP) as a mortgage servicer. In order to do so, respondent was required to sign a Servicer Participation Agreement (SPA) with the Federal National Mortgage Association (Fannie Mae). The SPA sets forth certain guidelines and directives to all servicer participants. The terms of the agreement are “governed by and construed under Federal law and not the law of any state or locality”; the agreement inures to the benefit of and is binding on the parties to the agreement and any permitted successors-in-interest. The SPA requires a servicer who participates in HAMP to perform certain actions before commencing a foreclosure action,

including determining whether a borrower is eligible for HAMP modification, and to extend modification upon certain criteria.

In May 2010, respondent acquired the servicing rights from CitiMortgage. Respondent notified appellant that it would not accept further payments at this reduced level, and no further forbearance or extension agreements were reached or offered. In November 2010, appellant's unemployment benefits ended, which, according to appellant, made her ineligible for the UP program, but potentially eligible for loan modification under HAMP. Appellant asked respondent for mortgage assistance, including modification under HAMP. Respondent either denied or did not respond to her inquiries. In December 2010, respondent began foreclosure proceedings, without screening for eligibility for loan modification under HAMP. The initial foreclosure proceeding was suspended, but respondent began foreclosure proceedings again in October 2011.

Appellant does not dispute that HAMP does not provide a private cause of action for violations of its rules or directives. *See Cox v. Mortg. Elec. Reg. Sys., Inc.*, 794 F. Supp. 2d 1060, 1064 (D. Minn. 2011), *aff'd*, 685 F.3d 663 (8th Cir. 2012). Instead, appellant served a complaint on respondent, alleging violations of state laws governing mortgage servicers, collection agencies, and consumer protection, and negligence and breach of contract. Respondent moved to dismiss pursuant to Minn. R. Civ. P. 12.02(e) (failure to state a claim upon which relief can be granted). Because it considered matters outside of the pleadings, the district court treated the motion as one for summary

judgment. The district court granted respondent's motion to dismiss. This appeal followed.

DECISION

On appeal from summary judgment, we review the district court's decision de novo, to determine whether (1) there are genuine issues of material fact and (2) the lower court erred in its application of the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The parties have not alleged that there are genuine issues of material fact that would preclude summary judgment; we therefore consider whether the district court correctly applied the law.

Violation of Minnesota Mortgage Originator and Service Licensing Act

Appellant argues that she has a private right of action under Minn. Stat. § 58.18, subd. 1, which states that a borrower injured by a violation of section 58.13 has a private right of action and may be awarded damages, punitive damages, costs, and attorney fees. Appellant asserts that respondent violated section 58.13, subdivision 1(a)(5),¹ which states that “[n]o person acting as a residential mortgage . . . servicer . . . shall . . . fail to perform in conformance with its written agreements with borrowers, investors, other licensees, or *exempt persons*[.]” (Emphasis added.) Minn. Stat. § 58.18, subd. 1, provides a private cause of action if a mortgage servicer violates its written agreements with exempt persons. An “exempt person” includes “a person who is not in the business of making residential mortgage loans” and “an agency of the federal government[.]” Minn. Stat. §§ 58.02, subd. 9; .04, subds. 1(c)(1, 3), 2(b)(5) (2012). Appellant contends that

¹ Appellant's amended complaint asserts other causes of action under section 58.13, but she has not advanced those arguments on appeal.

respondent (1) is a mortgage servicer; (2) has a written agreement, the SPA, with Fannie Mae, which is an “exempt person;” and (3) failed to follow the SPA directives as to appellant’s loan-modification request.

The district court first acknowledged that established law holds that borrowers have no third-party right to assert a claim of breach of an SPA, citing *McInroy v. BAC Home Loan Servicing, LP*, No. 10-4342, 2011 WL 1770947 (D. Minn. May 9, 2011). The district court next concluded that appellant does not have standing to assert a cause of action arising out of a contract to which she was not a party. “Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court.” *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011). A party acquires standing either because he has suffered an injury-in-fact or because a statute or legislative enactment has conferred a right to standing. *Id.* “An injury-in-fact is a concrete and particularized invasion of a legally protected interest.” *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007). Appellant has not suffered an injury-in-fact because she is not a party to the SPA and thus does not have a legally protected interest in the contract. But appellant argues that sections 58.13 and 58.18 confer statutory standing on her.

If the words of a statute are “clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16 (2012). If a statute is ambiguous, that is, susceptible to more than one reasonable meaning, a court may use canons of construction to discern the legislature’s intent. *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010).

In our opinion, these statutes are ambiguous. Sections 58.13, subdivision 1(a)(5) and 58.18, subdivision 1, do not specifically state that only a party to a written agreement has the right to bring a private action; in that sense, they are ambiguous. Section 58.18, subdivision 1, gives an injured *borrower*, not just a “party” or “person” a private right of action for a violation of the standards of conduct set forth in section 58.13. It is possible to interpret the statute to confer standing on an injured borrower or to confer standing only on a borrower whose contract with a mortgage servicer is breached. Because the statute is ambiguous, we can consider other matters, including the consequences of a particular interpretation. Minn. Stat. § 645.16(6).

Section 58.13 sets forth standards of conduct to which a mortgage servicer must adhere. Minn. Stat. §§ 58.01 to .19 (2012), entitled “Mortgage Originator and Service Licensing,” deals with the licensing and regulation of mortgage lenders and mortgage servicers, as well as with prohibited conduct that can lead to the denial, suspension, or revocation of licenses by the commissioner of commerce. *See* Minn. Stat. § 58.12. The commissioner may discipline a licensee for violations of this chapter, including for violations of the standards of conduct set forth in section 58.13. *Id.*, subd. 1(b)(2)(i). The main thrust of section 58.13, subdivision 1(a)(5) is that a servicer must perform in accordance with its written agreements, or face discipline. The inclusion of “borrowers, investors, other licensees, or exempt persons” allows the commissioner to regulate the mortgage servicer’s conduct across the entire range of its activities. *See* Minn. Stat. § 58.13, subd. 1(a)(5).

But, typically, only parties to a contract are permitted to enforce its terms. *Hickman v. SAFECO Ins. Co. of America*, 695 N.W.2d 365, 369 (Minn. 2005). A stranger to a contract may enforce a promise made for his benefit that would otherwise be unenforceable, as a third-party intended beneficiary of the contract. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). Government contracts are more strictly scrutinized, because of “the complications that would ensue from private enforcement of government contracts by members of the general public.” *Id.* at 834 (quotation omitted). The Restatement (Second) Contracts § 313 cmt. a (1981) states that “[g]overnment contracts often benefit the public, but individual members of the public are treated as incidental^[2] beneficiaries unless a different intention is manifested.” *Id.* at 833-34 (quotation omitted). With regard to government contracts, courts consider whether there is a remedy for enforcement of the promise or some other clear expression of intent to permit a third party to enforce the contract. *Id.* As stated in *Bohnhoff v. Wells Fargo Bank, N.A.*, 853 F. Supp. 2d 849, 853 (D. Minn. 2012), neither HAMP nor the SPA provide for private causes of action, a clear expression of intent not to permit private enforcement. *See also McInroy*, 2011 WL 1770947, at *2-3 (stating that borrowers are not third-party intended beneficiaries of agreements between mortgage servicers and Fannie Mae). The SPA itself states that it “shall inure to the benefit of and be binding upon the parties to the Agreement and their permitted successors-in-interest.” This suggests that the government did not intend to create a cause of action for borrowers who

² An intended beneficiary can enforce a contractual promise; an incidental beneficiary cannot.

were denied modification. In the face of these considerations, we are reluctant to expand enforcement of contractual rights to someone who is not a party to the contract.

Because HAMP did not include a private right of action, and based on traditional contract principles, we conclude that the district court did not err by determining that appellant lacked standing to assert a breach of a contract to which she was not a party. Therefore, the district court did not err by granting summary judgment on appellant's cause of action under Minn. Stat. §§ 58.13, subd. 1(a)(5) and 18, subd. 1.

Negligence per se

Appellant argues that respondent's violation of section 58.13, subdivision 1(a)(5), also gives rise to a claim of negligence per se. Appellant asserts that she is a person within the intended protection of the statute and that she suffered the type of harm against which the statute was intended to protect.

[N]egligence per se is a form of ordinary negligence that results from violation of a statute. To prove a negligence claim, the plaintiff must show that the defendant breached a duty of care that proximately caused the plaintiff damage. The difference between ordinary negligence and negligence per se is that in negligence per se, a statutory duty of care is substituted for the ordinary prudent person standard such that a violation of a statute is conclusive evidence of duty and breach.

Johnson v. Paynesville Farmers Union Coop Oil Co., 817 N.W.2d 693, 706 (Minn. 2012) (quotations and citations omitted). A statutory breach is a violation of a duty of care "if the persons harmed by that violation are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent. The statute or ordinance imposes a fixed duty of care, so its breach constitutes conclusive evidence of

negligence.” *Alderman’s Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995) (quotation omitted).

Although appellant is among the group of people that section 58.13 standards of conduct are designed to protect, she is nevertheless a stranger to the contract. Logically, the statute is designed to protect an individual who is harmed by the failure to abide by a written agreement. Thus, a borrower can enforce his contract with a mortgage servicer and an investor can enforce his contract with a mortgage servicer. Therefore, while appellant may be within the protected group, she is not within the group protected when the failure to abide by an agreement is between a mortgage servicer and an exempt person. Appellant’s negligence per se claim fails because section 58.13 does not create a duty of care to appellant for the particular violation she alleges.

Minnesota Collection Agency Licensing and Registration Act

Appellant argues that respondent is a collection agency within the meaning of Minn. Stat. §§ 332.31-45 (2012), and that respondent has violated its duties under this section. Appellant asserts that (1) respondent violated its contract with Pacifica by trying to collect amounts that were not yet due; (2) this is a violation of section 58.13, subdivision 1(a)(5), because respondent failed to perform in accordance with its written contract with Pacifica, an investor; and (3) appellant has a private right of action under section 58.18, subdivision 1, because of the violation of section 58.13, subdivision 1(a)(5).

This theory is an alternate assertion of appellant's first claim, and we reject it for the same reason: appellant lacks standing because she is not a party to the contract between respondent and Pacifica.

Motion to strike

Respondent moved to strike section II.A of appellant's reply brief. In that section, appellant refers to e-mails supporting her claim that she was offered an extension agreement by CitiMortgage. These e-mails were not provided to the district court and are therefore not a part of the appellate record. Minn. R. Civ. App. P. 110.01 (stating that the record on appeal is comprised of "papers filed in the trial court, the exhibits, and the transcript of the proceedings"). As a general rule, we will not consider matters outside of the appellate record nor base a decision on matters not produced and received into evidence below. *Embree v. U.S. Bank Nat'l Ass'n*, 828 N.W.2d 141, 145 (Minn. App. 2013).

Affirmed; motion granted.