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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0626**

Wells Fargo Bank, N.A.,
Respondent,

vs.

Wendi S. Boedigheimer, et al.,
Appellants.

**Filed December 16, 2013
Affirmed
Rodenberg, Judge**

Washington County District Court
File No. 82-CV-12-2968

Charles F. Webber, Erin L. Hoffman, Faegre Baker Daniels LLP, Minneapolis,
Minnesota (for respondent)

Rene L'Esperance, Boedigheimer Law Firm, P.A., St. Paul, Minnesota (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Rodenberg, Judge; and
Hooten, Judge.

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

RODENBERG, Judge

Appellants Wendi S. Boedigheimer and Robert Boedigheimer appeal from a grant of summary judgment in favor of respondent Wells Fargo Bank, N.A. on its claims arising from a revolving-line-of-credit agreement between the parties. Appellants also appeal the district court's summary dismissal of their counterclaims. We affirm.

FACTS

Appellants entered into a revolving-line-of-credit agreement with respondent¹ on August 3, 1999. This was a variable-rate credit agreement, with a maximum interest rate of 18%, a credit limit of \$50,000, and a maturity date of July 30, 2004. The agreement did not contain a choice-of-law clause.² The validity of the initial credit agreement is not challenged on appeal. Appellants' balance on the account fluctuated for several years as they both used the credit line and paid down the balance from time to time. Appellants made their last draw on the account on May 24, 2002. After that time, appellants made payments each month by way of automatic electronic payments in response to monthly account statements mailed by respondent. Appellants stopped making payments on the account in 2010.

On September 6, 2002, respondent sent appellants documents setting forth new terms to apply to the account (2002 mailing). The 2002 mailing did not seek any expression of assent to the changes in terms, but stated that continued use of the account after the effective date of December 14, 2002 would constitute acceptance of the new terms. Appellants did not pay off the debt and continued their indebtedness on the account after that date. The 2002 mailing also removed the July 30, 2004 maturity date

¹ In 2000, Norwest Bank Minnesota, N.A. changed its name to Wells Fargo Bank Minnesota, N.A. The named creditor on the account has changed several times over the years, and is now Wells Fargo Bank, N.A. We refer to these different Wells Fargo entities collectively as "respondent," as the various name changes do not affect the outcome of this case.

² The contract was between Minnesota residents and a national bank headquartered in Minnesota. Therefore, Minnesota law would have governed the original contract. No contrary argument is made on appeal.

in the original agreement and increased the “floor” interest rate to seven percent, and added a choice-of-law clause identifying South Dakota law as applying to the account. Appellants continued to keep a balance on the account after the original maturity date of July 30, 2004 and never attempted to pay off or otherwise close their account prior to ceasing monthly payments in 2010.

There were two subsequent mailings changing the terms of the credit agreement. The first was on June 20, 2006 and related to changes in various service charges (2006 mailing). The second was on August 10, 2009 and increased the minimum interest rate to 15.74% and lowered the credit limit (2009 mailing). Both mailings set forth an effective date after which the changed terms would apply to the account if appellants chose to continue their indebtedness on the account.

Prior to February of 2009, appellants’ automatic monthly payments applied only to interest on the account. Appellants increased their monthly payments in February 2009 in an effort to pay down the principal balance on the account. Approximately nine months later, the higher minimum interest rate applicable after the effective date of the 2009 mailing resulted in an increase in the minimum monthly payments, and resulted in appellants’ payments again applying only to interest. Appellants continued to make monthly payments on the account until June 2010, and made a final payment of \$1,000 on September 3, 2010. In October of 2010, appellants sent several letters to respondent requesting various documents relating to the account. Appellants contend that they did not receive any responses to these requests until August 2012.

Respondent sued appellants in May 2011 for breach of contract and for an account stated, claiming that appellants owed a balance of \$42,735.76³ plus interest at six percent per year. Appellants counterclaimed, alleging unjust enrichment, quantum meruit,⁴ and breach of the implied covenant of good faith and fair dealing. Appellants also asserted that respondent's claims are barred by the applicable statute of limitations and that the original revolving-line-of-credit agreement was usurious.⁵

Respondent moved the district court for summary judgment, arguing that no genuine issues of material fact existed concerning any claim against it. Appellants argued that material issues of fact precluded granting respondent's motion, and moved for summary judgment dismissing respondent's complaint. The district court granted respondent's motion in its entirety and denied appellants' motion in its entirety. This appeal followed.

DECISION

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). No genuine issue for trial exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.

³ The complaint originally sought \$43,047.76 plus interest but on appeal the parties agree that the correct amount is \$42,735.76.

⁴ The district court dismissed this counter-claim with the parties' consent.

⁵ The district court determined that the underlying agreement was not usurious, and appellants do not challenge this determination on appeal.

1997). “Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.” *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). Additionally, “we may affirm a grant of summary judgment if it can be sustained on any grounds.” *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

I.

The district court granted summary judgment to respondent on theories of breach of contract and account stated. We first address the account stated claim. “An account stated comes into being through an acknowledgment or an acquiescence in the existing condition of liability between the parties.” *Meagher v. Kavli*, 251 Minn. 477, 487, 88 N.W.2d 871, 879 (1958). The supreme court summarized the claim as follows:

If an account rendered is acquiesced in by the parties and the correctness of the statement is admitted, then the law will imply a promise to pay whatever balance is thus acknowledged to be owing and due, without further proof; likewise, proof of the retention of a statement of account without objection for more than a reasonable length of time may under certain circumstances operate as proof of an acquiescence in or an admission of the correctness of the statement of account and permit the legal inference that an account stated has been established.

Id. Once established, an account stated “may be impeached for mistake or error in law or in fact with respect to the items included in it, or for omission of items.” *Id.* at 489, 88 N.W.2d at 880. Generally, the available defenses to an account stated are limited to fraud or mistake. *See Behrens v. Kruse*, 132 Minn. 69, 72, 155 N.W. 1065, 1067 (1916)

(explaining that an account stated “can be . . . set aside only on the ground of fraud or mistake”).

Appellants argue that there is a genuine issue of material fact on the claim of account stated because they have not mutually assented to the stated amount due. They argue that they could not be found to have assented because respondent never provided appellants “with an itemization of charges and a complete balance and/or transaction summary on the account until . . . August 28, 2012.” We are not persuaded. It is undisputed that respondent sent monthly statements regarding the account to appellants. Although appellants claim that they sent some letters in 2010 requesting additional documents, the record contains months of statements before 2010, with deductions made from the continuing balance as payments were made. Appellants’ failure to challenge any of these statements is sufficient to demonstrate acquiescence by appellants in the statements of account. *Meagher*, 251 Minn. at 487, 88 N.W.2d at 879.

A single or comprehensive transaction summary is not required to prove an account stated claim. “If an account stated is established it will constitute a promise to pay whatever balance is thus acknowledged to be due *without proof of separate items* for the reason that it has thereby become a new and independent cause of action” *Id.* (emphasis added); see also 29 Richard A. Lord, *Williston on Contracts* § 73:58, at 177 (4th ed. 2003) (“It is not essential that the account be stated in any particular form.”). A comprehensive transaction summary may have been sufficient to demonstrate acquiescence in the account stated, but it is not necessary to prove the claim.

Appellants also argue that respondent has only shown a prima facie case of an account stated, and that appellants may challenge that showing. In the context of resisting a summary judgment motion, appellants were obligated to raise some genuine issue of material fact. *Riverview Muir Doran*, 790 N.W.2d at 170. Having assented to the account stated, appellants must make some showing of fraud or an error in the accounting itself. *Behrens*, 132 Minn. at 72, 155 N.W. at 1067. Appellants have produced nothing demonstrating that the accounting is either fraudulent or flawed. They argue only that they could not have assented to the accounting without being provided documentation. But, as discussed, there were years of monthly account statements and corresponding monthly payments made by appellants without objection until 2010.

Finally, appellants argue that their assent to the account stated cannot be implied based upon the parties' relationship as creditor and debtor. Minn. Stat. § 513.33, subd. 3(b) (2012) ("A credit agreement may not be implied from the relationship . . . of the creditor and the debtor."). The statute on which appellants rely does not apply to this situation. "Credit agreement" is defined as 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(1) (2012). An account stated does not fall within this definition. Additionally, the statute only bars a debtor from maintaining an action based upon an implied agreement. *Id.*, subd. 2 (2012). Respondent is the creditor here.

Appellants received monthly statements from respondent over many years and made regular payments on the account until June 2010, all without objection to the stated amount due. Assent based on silence or acquiescence is generally a question for the jury.

See Lord, *supra*, § 73:58, at 178-79 (describing the issue of assent as a jury question). But given appellants' monthly payments without objection, their silence in response to the monthly statements they received, and their having produced nothing to raise any material fact issue with respect to the accounting, no reasonable finder-of-fact could find that appellants have not acquiesced to the account stated. We therefore affirm the district court's summary judgment on the account stated claim.

Because we conclude that the summary judgment was appropriately granted based upon the account stated theory, we need not separately address appellants' argument regarding the summary judgment on the breach-of-contract theory. See *Doe 76C*, 817 N.W.2d at 163 (“[W]e may affirm a grant of summary judgment if it can be sustained on any grounds.”).

II.

The district court dismissed appellants' unjust enrichment counterclaim, holding as a matter of law that the claim is impermissible when there is an adequate remedy at law. We review the district court's legal determination on this issue de novo. *Riverview Muir Doran*, 790 N.W.2d at 170; *City of Minneapolis v. Ames & Fischer Co. II, LLP*, 724 N.W.2d 749, 757 (Minn. App. 2006) (dismissing counterclaims on appeal from summary judgment).

A party is not entitled to the equitable remedy of unjust enrichment when there is an adequate remedy at law. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996). The theory of account stated is a legal cause of action. See Lord, *supra*, § 73:55, at 171 (“When the account has . . . been assented to, it becomes

a new contract.”). Because appellants are not entitled to assert the equitable defense of unjust enrichment here, we affirm the district court’s dismissal of appellants’ unjust enrichment counterclaim.

III.

The district court held that, under either Minnesota or South Dakota law,⁶ appellants had failed to establish a genuine issue of material fact concerning their counterclaim for breach of the implied covenant of good faith and fair dealing. We review a district court’s summary dismissal of a counterclaim de novo and will reverse if there are genuine issues of material fact or if the district court misapplied the law. *Riverview Muir Doran*, 790 N.W.2d at 170. In Minnesota, “every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party’s performance of the contract.” *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (quotation omitted). In South Dakota, “an aggrieved party [may] sue for breach of contract when the other contracting party, by his lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain.” *Barett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990).⁷

⁶ The parties argue about whether a choice-of-law clause in the 2002, 2006, or 2009 mailings validly changed the applicable law on the account to South Dakota law. We decline to address this issue because the analysis and outcome are the same here under either state’s law.

⁷ South Dakota further limits this doctrine by disallowing it as a separate tort; it must be raised as part of a breach-of-contract claim. *Farm Credit Servs. of Am. v. Dougan*, 704 N.W.2d 24, 27 (S.D. 2005). Appellants have not brought a breach-of-contract counterclaim.

First, appellants contend that respondent breached this covenant by increasing the interest rate on the account by way of the 2009 mailing after appellants increased their monthly payments in February 2009 in an attempt to pay down the principal. Second, appellants argue that respondent's failure to provide documents at appellants' request hindered appellants' ability to perform under the agreement or make payments on the account stated.

As to appellants' first argument, there is no evidence of record to support their contention that the increase in the interest rate in September 2009 was made with the intent to prevent appellants from paying off their account. For approximately six months prior to the 2009 mailing, appellants made monthly payments which partially paid down the principal on the account. The record is silent concerning the reasons for the interest rate change in September 2009. No record evidence suggests that it was motivated by any attempt to hinder appellants in paying down the principal on the account stated or that it was otherwise motivated by bad faith or unfairness. The 2009 mailing suggests that the changes made to the account at that time may have been the result of a change in appellants' credit score, or because the proportion on existing balances were too high relative to credit limits, or for other reasons. Appellants offer only speculation as to the reasons for the interest rate increase, and speculation is insufficient to raise a genuine issue of material fact. *See Hangsleben*, 505 N.W.2d at 328 ("Mere speculation, without some concrete evidence, is not enough to avoid summary judgment."). Additionally, appellants continued to make payments on the account for almost a year after they

received the 2009 mailing, establishing their continued assent to the account stated even after the interest rate change.

Appellants' second argument, that respondent's failure to provide documents prevented appellants from making payments, is similarly unpersuasive. Appellants claim that they requested records in 2010, but they offer nothing in support of the argument that respondent's failure to respond to that request hindered payment on the account or was somehow a condition precedent to payment. The district court did not err in dismissing appellants' counterclaim for breach of the implied covenant of good faith and fair dealing.

Affirmed.