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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1166

Langford Tool & Drill Co.,
Plaintiff,

vs.

The 401 Group, LLC,
Appellant,

Uppal Enterprises, LLC, et al.,
Defendants,

and

ADB Construction Company, Inc., et al.,
Intervenors and Third Party Plaintiffs,

vs.

Positive Companies, Inc.,
Third Party Defendant,

and

SR Mechanical, Inc.,
Intervenor and Third Party Plaintiff,

vs.

Vikram Uppal, et al.,
Third Party Defendants,

Sohan Uppal,
third party defendant,
Appellant,

and

Central Bank, as successor in interest to Mainstreet Bank,
third party plaintiff,
Respondent,

vs.

Vijay Uppal,
third party defendant,
Appellant,

Olsen Fire Protection, et al.,
Third Party Defendants,

and

Egan Companies, Inc., Intervening Mechanic’s Lien Claimant,
and Century Construction Company, Inc.,
Third Party Plaintiff,

vs.

The 401 Group, LLC, et al.,
third party defendants,
Appellants,

Central Bank as successor in interest to Mainstreet Bank,
third party defendant,
Respondent,

Positive Companies, Inc.,
Third Party Defendant,

and

J. H. Larson Electrical Company,
Third Party Plaintiff,

vs.

Vikram Uppal, et al.,
Third Party Defendants,

Sohan Uppal, et al.,
third party defendants,
Appellants.

Filed March 19, 2012
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-09-20489

Kay Nord Hunt, Lee A. Hutton, III, Nick A. Dolejsi, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellants)

Thomas H. Boyd, John C. Holper, Kristopher D. Lee, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Respondent-lender sued appellant-borrowers for defaulting on the parties' loan agreement. Appellants challenge the district court's granting of summary judgment in respondent's favor, contending (1) genuine disputes of material fact preclude summary judgment and (2) the district court abused its discretion by denying their motions for a continuance and reconsideration. Because the undisputed evidence demonstrates that appellants defaulted on the loan agreement and the evidence appellants sought to obtain and introduce in their continuance and reconsideration requests is not relevant to the dispositive issues, we affirm.

FACTS

On May 14, 2008, appellants The 401 Group, LLC, and its officers and guarantors Sohan and Vijay Uppal (collectively, The 401 Group) and respondent Mainstreet Bank executed two notes, a loan agreement, a guaranty, and two mortgages (collectively, the contract) in connection with a construction loan. Mainstreet agreed to make periodic advances up to a total of $6,130,000 provided that The 401 Group was in compliance with all of its obligations under the loan agreement.

From May through August 2009, Mainstreet corresponded with The 401 Group about several mechanic's liens against the subject property, including a lien filed by Langford Tool and Drill Company. Mainstreet allegedly requested that The 401 Group put 150% of the value of the liens in escrow with the title company. Mainstreet also expressed concern that the loan appeared to be "out of balance" (i.e., the amount of money remaining to be advanced under the loan appeared to be insufficient to cover the remaining construction costs) and asked The 401 Group to provide documentation of the remaining costs. On August 13, Langford commenced this mechanic's lien action. Despite knowledge of the action, on August 26, Mainstreet told The 401 Group that it intended to fund its July/August draw request, pending "the necessary approvals."

But on August 27, the Federal Deposit Insurance Corporation shut down Mainstreet, and respondent Central Bank purchased all of Mainstreet's assets and obligations, including the contract. Claiming that Mainstreet never received documentation regarding the remaining project costs, Central Bank asked The 401 Group to provide the documents but never received them. Central Bank refused to fund the

July/August draw request. The 401 Group subsequently failed to repay the notes in full on or before November 14, 2009, when the notes matured, and it did not cure its default.

Central Bank asserted cross-claims against The 401 Group, seeking a money judgment and foreclosure of the mortgages. The 401 Group denied the cross-claims, contending that any alleged defaults were excused by Central Bank's refusal to advance funds pursuant to the July/August draw request.[1] The district court granted summary judgment in favor of Central Bank on all claims. This appeal follows.

D E C I S I O N

I. The district court did not err by granting summary judgment in favor of Central Bank.

> On an appeal from a grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted.

Sampair v. Vill. of Birchwood, 784 N.W.2d 65, 68 (Minn. 2010) (citation omitted).

The 401 Group argues that the district court erred by summarily dismissing its cross-claims because Central Bank breached the loan agreement by refusing to advance funds pursuant to The 401 Group's July/August 2009 draw request. Additionally, The 401 Group asserts that the district court erred by summarily awarding Central Bank damages and foreclosure of the mortgages because Central Bank's refusal to advance

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[1] The 401 Group asserted cross-claims against Central Bank for breach of contract, breach of implied covenant of good faith and fair dealing, anticipatory repudiation of the loan agreement, equitable estoppel, tortious interference with contract, and tortious interference with prospective contract.

funds excused The 401 Group's subsequent default on the loan agreement. We turn first to whether Central Bank breached the loan agreement.

A. Central Bank did not breach the loan agreement by refusing to fund The 401 Group's July/August draw request.

The 401 Group argues that Central Bank breached the loan agreement by denying the draw request because all of the conditions precedent to Central Bank's obligation to advance funds had either occurred or been waived by Mainstreet at the time of the July/August draw request. The loan agreement effectively conditions Central Bank's obligation to advance funds on The 401 Group's compliance with all of the terms of the loan agreement:

> The obligation of the Lender to make each Advance shall be subject to the further conditions precedent that on the date of such Advance:
>
> (a) No Event of Default hereunder, or event which would constitute an Event of Default upon the giving of notice or the passage of time or both, shall have occurred and be continuing . . . .
>
> . . . .
>
> Occurrence of any one or more of the following shall constitute an Event of Default:
>
> . . . .
>
> (b) The Borrower shall fail to duly *observe or perform any of the other terms, conditions, covenants or agreements* required to be observed or performed by it hereunder and such failure shall continue for a period of 30 calendar days following written notice of such failure, or such additional time as is reasonably necessary, not to exceed 90 calendar days.

Sections 3.2(a), 6.1(b) (emphasis added). Specifically, Central Bank's obligation to advance funds is conditioned upon The 401 Group's compliance with the following mechanic's lien provision:

> The Borrower agrees that, without the prior written consent of the Lender, it will not:
>
> (a) Create or permit to be created or allow to exist any mortgage, encumbrance or other lien upon the Land or Improvements thereon, except those shown in the title insurance policy referred to in Section 3.1 hereof and approved by the Lender, or stated in Section 3.1(b) and except mechanics' and materialmen's liens in respect of obligations which are not due (provided that such liens are actually junior and subordinate to the lien of the Mortgage and said title insurance policy insures against loss by reason of such liens).

Section 5.2(a).

It is undisputed that Langford filed a mechanic's lien for work it had already performed on The 401 Group's property.[2] The banks did not give The 401 Group written permission to create or allow the creation of this lien as required by section 5.2(a). The 401 Group concedes these facts, but contends that they do not justify Central Bank's refusal to advance funds because (1) Mainstreet did not provide written notice of default; (2) section 5.2(a) of the loan agreement is ineffective because it conflicts with the terms of one of the mortgages; (3) Mainstreet waived the requirements of section 5.2(a); and

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[2] The 401 Group notes that because the mechanic's lien was junior to the bank's mortgages, it did not constitute a breach of section 5.2(a). But section 5.2(a) only permits junior mechanic's liens "in respect of obligations which are not due." Because Langford's lien resulted from obligations *already* due, The 401 Group's argument fails.

(4) Central Bank is bound by Mainstreet's expressed intentions to fund the July/August draw request. We consider each argument in turn.

1. Lack of written notice of default

The 401 Group argues that the Langford lien did not relieve Central Bank of its obligation to advance funds because Mainstreet never provided written notice that the filing of the lien constituted an event of default. We disagree. Central Bank's obligation to advance funds is conditioned upon the non-occurrence of any "Event of Default hereunder, or event *which would constitute an Event of Default upon the giving of notice* or the passage of time or both," which includes any breach of the loan agreement. (Emphasis added.) Thus, Mainstreet's failure to notify The 401 Group that the Langford lien constituted an event of default is irrelevant to whether the lien justified Central Bank's subsequent refusal to advance funds.

2. Conflict between the loan agreement and a mortgage

The 401 Group also contends that there is a factual dispute as to the effectiveness of section 5.2(a) because it is inconsistent with paragraph 4 of a contemporaneously executed mortgage. "Generally, instruments executed at the same time, by the same parties, relating to the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. July 19, 2011). A contract containing irreconcilable conflicts is ambiguous, *Morris v. Weiss*, 414 N.W.2d 485, 487 (Minn. App. 1987), and the interpretation of an ambiguous

contract presents a question of fact. *Kilcher v. Dale*, 784 N.W.2d 866, 871 (Minn. App. 2010).

Analysis of the two provisions shows that they do not directly conflict. Section 5.2(a) of the loan agreement prohibits The 401 Group from permitting certain types of liens to be created without the written consent of the banks. Paragraph 4 of the mortgage dictates the way in which an existing lien must be handled:

> Mortgagor shall promptly discharge any lien which has priority over this Mortgage, provided, that Mortgagor shall not be required to discharge any such lien as long as Mortgagor shall agree in writing to the payment of the obligation secured by such lien in a manner acceptable to Mortgagee, or shall in good faith contest such lien by, or defend enforcement of such lien in, legal proceedings which operate to prevent the enforcement of the lien or forfeiture of the Property or any part thereof.

Although section 5.2(a) acts to preclude the application of paragraph 4 in many instances, it is not inconsistent with paragraph 4. If, for instance, the banks had permitted a mechanic's lien otherwise prohibited by section 5.2(a) to attach to the property, paragraph 4 would control whether and how The 401 Group would discharge that lien or prevent its enforcement. The fact that the two provisions implicate mechanic's liens in different ways does not make them inconsistent so as to create a material fact issue and thus preclude application of section 5.2(a).

3. Mainstreet's previous waiver of the mechanic's lien provision

The 401 Group next asserts that Central Bank waived its right to withhold payment of the July/August draw request because the parties "resolved" the mechanic's lien issue "to [Mainstreet's] satisfaction" when The 401 Group agreed to escrow funds to

cover the cost of the lien. The 401 Group contends that this resolution effectuated an oral modification of the loan agreement. We are not persuaded. The loan agreement contains a nonwaiver clause:

> No waiver by the Lender of any default hereunder shall operate as a waiver of any other default or of the same default on a future occasion. No delay on the part of the Lender in exercising any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy preclude other or future exercise thereof or the exercise of any other right or remedy.

Section 7.7. Thus, even if Mainstreet waived the mechanic's-lien condition to its *past advances*, it did not waive that condition to its *future advances*.

The 401 Group contends that the nonwaiver clause is unenforceable based on our decision in *Pollard v. Southdale Gardens of Edina Condo. Ass'n*, 698 N.W.2d 449 (Minn. App. 2005). We disagree. In *Pollard*, we held that there was sufficient evidence to create a fact issue whether a condominium association orally modified the nonwaiver clause and the no-pet provision in its lease when it consistently told residents that they could own pets over the course of 12 years. We did not declare nonwaiver clauses per se invalid. *Pollard*, 698 N.W.2d at 453 ("[T]he mere presence of a nonwaiver clause does not *automatically* bar a waiver claim." (emphasis added)); *see also Marblestone Co. v. Phoenix Assur. Co.*, 169 Minn. 1, 12, 210 N.W. 385, 387 (1926) ("[T]he nonwaiver clause must be given its fairly intended effect."); *Minneapolis Cmty. Dev. Agency v. Powell*, 352 N.W.2d 532, 535 (Minn. App. 1984) (upholding and applying a nonwaiver clause in a public-housing lease). We merely held that under some circumstances, parties

to a contract may orally modify a nonwaiver clause by their words or conduct, rendering the clause ineffective. *Pollard*, 698 N.W.2d at 453-54.

But no such oral modification was possible here because Minn. Stat. § 513.33 (2010) requires that all modifications to credit agreements, such as the loan agreement, be in writing. An "agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements" is unenforceable "unless 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, subds. 2, 3(a)(3). Mainstreet's alleged oral agreement to permit the Langford lien in exchange for The 401 Group's escrow of funds is subject to section 513.33's writing requirement. It is undisputed that the parties did not modify the loan agreement in writing. Accordingly, the oral financial accommodation between Mainstreet and The 401 Group does not modify the nonwaiver clause or any other provision of the loan agreement.[3] *See BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 902-03 (Minn. App. 2010) (holding that a party may not assert an oral financial accommodation as a defense to a

[3] The 401 Group argues that parties to a contract may waive the requirement that contract modifications be in writing, citing *Albany Roller Mills, Inc. v. N. United Feeds & Seeds, Inc.*, 397 N.W.2d 430, 433 (Minn. App. 1986). But *Albany Roller Mills* stands only for the proposition that parties to a contract may waive a contractual written-modification requirement contemplated by Minn. Stat. § 336.2-209, which explicitly states that "[a]lthough an attempt at modification or rescission does not satisfy the requirements of [the statute of frauds or a contractual written-modification requirement] it can operate as a waiver." 397 N.W.2d at 433 (quoting Minn. Stat. § 336.2-209 (1984), which is identical to the current statute). Minn. Stat. § 513.33, which applies to the parties' credit agreement, contains no such exception to the writing requirement.

breach-of-credit-agreement claim), *review denied* (Minn. May 18, 2010); *Becker v. First Am. State Bank*, 420 N.W.2d 239, 241 (Minn. App. 1988) (holding that bank's oral agreement to continue lending funds to borrower was unenforceable under Minn. Stat. § 513.33).

Our decision to enforce the nonwaiver clause not only comports with section 513.33, but promotes sound public policy. A nonwaiver clause in a lending agreement allows the lender to forebear small or temporary defects in the borrower's performance without waiving its right to terminate the agreement when and if it becomes apparent that the borrower cannot or will not cure the defects. Were we to declare all such nonwaiver clauses ineffective, a lender would be forced to choose between enforcing each and every right under a lending agreement—which may lead to harsh results for the borrower and effectively make it impossible for the borrower to repay the loan—or suffer the borrower's breaches of the lending agreement indefinitely. Such a result could harm both lenders and borrowers.

In sum, we reject The 401 Group's argument that, by advancing funds in the *past* despite the existence of the Langford lien, Mainstreet waived its right (and Central Bank's right) to withhold *future* funds as long as the lien existed.

4. Mainstreet's intent and commitment to fund the July/August draw request

The 401 Group argues that Central Bank is bound by Mainstreet's expressed intention to fund the July/August draw request. We disagree. The 401 Group cites no legal support for this contention but simply states that "[i]t was and is [Mainstreet's], not

Central Bank's, decision which controlled." Because not all of the conditions precedent to an advance had occurred, the district court correctly concluded that Central Bank was contractually entitled to withhold funds, regardless of what its predecessor would have chosen to do in the same circumstances.

Moreover, even if The 401 Group had asserted an equitable-estoppel theory on appeal, as it does in its complaint, it could not prevail.

> Equitable estoppel may be asserted when: (1) there has been a misrepresentation of a material fact; (2) the party to be estopped knew or should have known that the representation was false; (3) the party to be estopped intended that the representation be acted upon; (4) the party asserting equitable estoppel lacked knowledge of the true facts; and (5) the party asserting the estoppel did, in fact, rely upon the misrepresentation to his or her detriment.

Anderson v. Minn. Ins. Guar. Ass'n, 520 N.W.2d 155, 160 (Minn. App. 1994), *rev'd on other grounds*, 534 N.W.2d 706 (Minn. July 28, 1995). The 401 Group's insistence that Mainstreet intended to honor its commitment to fund the July/August draw request belies any contention that Mainstreet made a misrepresentation of fact or knew that its representation was false. And The 401 Group makes no suggestion that Central Bank knew of Mainstreet's representation and intended for The 401 Group to rely on it despite Central Bank's plan to withhold funds. Thus, any equitable estoppel claim fails, and the district court did not err in determining that Central Bank did not breach the contract by withholding funds.

Because we conclude that the Langford lien relieved Central Bank of any obligation to fund the July/August draw request, we need not address Central Bank's

remaining arguments that it was entitled to withhold funds due to this litigation or The 401 Group's failure to balance the loans.

B. The 401 Group's default on the loan agreement entitles Central Bank to a money judgment and foreclosure of the mortgages.

The 401 Group acknowledges that it failed to make payments on the loan after it matured, which is an event of default that would ordinarily entitle Central Bank to a money judgment and foreclosure of the mortgages. But it argues that its actions were excused because Central Bank (1) failed to advance funds pursuant to the July/August draw request and (2) conditioned its advancement of future funds on The 401 Group's fulfillment of additional, non-contractual conditions. We disagree. A material breach of contract by one party excuses non-performance of the contract by the other party. *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 728-29 (Minn. App. 2011), *review dismissed* (Minn. Aug. 12, 2011). But as described above in section I.A., Central Bank did not breach the loan agreement by refusing to fund the July/August draw request. And because Central Bank was contractually entitled to withhold funds, it did not breach the loan agreement by offering to advance funds upon certain conditions. Therefore, The 401 Group's default is not excused, and Central Bank is entitled to a money judgment and foreclosure of the mortgages.

II. The district court did not abuse its discretion by denying The 401 Group's motion for a continuance to conduct additional discovery.

A party may move for summary judgment "at any time after the expiration of 20 days from the service of the summons." Minn. R. Civ. P. 56.01; *accord Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 46 (Minn. App. 2010). An opposing party may seek

to continue the motion in order to conduct additional discovery. Minn. R. Civ. P. 56.06. Courts should liberally grant such continuances, particularly where the party against whom summary judgment is sought has had insufficient time to complete discovery. *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 400 (Minn. App. 2010). But the district court may deny the continuance motion if the moving party seeks immaterial facts or has been dilatory in conducting discovery. *Id.* We review a district court's denial of a continuance motion for an abuse of discretion. *Id.*

The 401 Group argues that the district court abused its discretion by denying it a continuance to seek evidence that (1) Mainstreet never considered The 401 Group to be in default; (2) Mainstreet agreed to fund the July/August draw request; and (3) Central Bank never considered funding the draw request, for reasons unrelated to The 401 Group's performance under the contract. We disagree. Even if additional discovery could uncover such evidence, it would be irrelevant to the dispositive issues in this case: whether The 401 Group performed all the conditions precedent to Central Bank's advancement of funds and whether an event of default occurred. As stated above, Mainstreet's intent to advance funds to The 401 Group despite its contractual right not to do so is only relevant insofar as it *cuts against* The 401 Group's equitable-estoppel claim. Likewise, Central Bank's true motivations for exercising its contractual right not to advance additional funds to The 401 Group are irrelevant to whether The 401 Group was in compliance with the loan agreement when it made the July/August draw request. *See Harman v. Heartland Food Co.*, 614 N.W.2d 236, 241-42 (Minn. App. 2000) (noting that a party may exercise its legal rights regardless of its motive for doing so).

Not only is the additional discovery The 401 Group sought irrelevant to the dispositive issues, but The 401 Group was dilatory in conducting discovery. Most notably, The 401 Group did not initiate or participate in any discovery, including numerous depositions taken between the time Central Bank asserted its cross-claims and moved for summary judgment. On this record, we conclude that the district court did not abuse its discretion by denying The 401 Group's motion to continue the summary-judgment motion.

III. The district court did not abuse its discretion by denying The 401 Group's reconsideration motions.

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 under Minn. R. Gen. Pract. 115.11 "are considered only at the district court's discretion").

The 401 Group challenges the district court's treatment of a letter that it sent to the district court after the district court's denial of the motion for a continuance and the summary-judgment hearing. The 401 Group first asserts that the district court abused its discretion by (1) treating the letter as a motion for reconsideration rather than a motion to supplement the record under Minn. R. Civ. P. 56.05 and (2) denying its motion to supplement the record. We disagree. The letter does not expressly move or ask permission to bring a motion, nor does it mention supplementing the record. Instead, it requests "instruction as to how the Court would like [The 401 Group] to proceed." Given

the vagueness of the letter, the district court did not abuse its discretion by treating it as a motion to reconsider.

Moreover, even if the district court had treated the letter as a motion to supplement the record, denial of the motion would not constitute abuse of discretion. A party seeking to supplement the record must submit affidavits "made on personal knowledge" and "set[ting] forth such facts as would be admissible in evidence." Minn. R. Civ. P. 56.05. The letter from The 401 Group's counsel simply asserted: "My office recently received approximately 15,000 documents responsive to our discovery request from Central Bank. Several of those documents, we believe, would be germane to the summary judgment motion currently pending before you." This vague averment falls short of the rule 56.05 requirement.

Next, The 401 Group argues that the district court abused its discretion by refusing to grant its request for permission to file a post-judgment motion to reconsider. We are not persuaded. The district court should grant permission to file a motion to reconsider "only upon a showing of compelling circumstances." Minn. R. Gen. Pract. 115.11. The 401 Group's post-judgment motion sought to supplement the summary-judgment record with evidence that (1) Mainstreet never considered The 401 Group to be in default; (2) Mainstreet agreed to fund the July/August draw request; and (3) Central Bank never considered funding the draw, for reasons unrelated to The 401 Group's performance of the parties' agreements. Even if true, none of these allegations are relevant to the dispositive issues in this case, as explained above in section II. Accordingly, we

conclude that The 401 Group failed to show compelling circumstances, and the district court did not abuse its discretion by denying the motion to reconsider.

Affirmed.