STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1250

Central Bank, as successor in
interest to Mainstreet Bank,
Plaintiff,

vs.

Rowe Construction, Inc., et al.,
defendants and third party plaintiffs,
Appellants,

vs.

TitleMark, third party defendant,
Respondent,

Stewart Title Guaranty Company,
third party defendant,
Respondent.

Filed March 29, 2011
Affirmed
Hudson, Judge

Dakota County District Court
File No. 19HA-CV-08-3245

Ronald J. Walsh, Ronald J. Walsh, P.A., Bloomington, Minnesota (for appellants)

Kay Nord Hunt, Keith Broady, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for TitleMark)

Michael J. Orme, Dana K. Nyquist, Orme & Associates, Ltd., Eagan, Minnesota (for Stewart Title Guaranty Company)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

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

HUDSON, Judge

This case involves a mortgage "flipping" scheme. Appellants construction company and personal guarantors of mortgage-related note challenge the district court's summary judgment in favor of respondents closing agent and title-insurance company on appellants' claims for breach of fiduciary duty, failure to disclose material information, vicarious liability, and breach of contract. Because the district court did not err by granting summary judgment, we affirm.

FACTS

In May 2006, appellant Rowe Construction, Inc. purchased an unimproved lot located at 6590 Minnewashta Parkway in Carver County. Several months earlier, a friend had told appellants Susan Zimmerman-Rowe and Miles Rowe, principals of Rowe Construction, about a real-estate investment plan through which the friend had received nearly $100,000 in four months. The friend referred the Rowes to Shinon Lindberg, who explained that the plan involved supplying investors with a mortgage broker, New Day Capital, LLC, and a builder, 10Spring Homes Inc. An investor would then take out a loan on unimproved property and receive $25,000. After that, another investor would take out a loan to build a house on the property, pay off the original loan, and share the profits from the sale of the new home with Lindberg, the builder, and both investors. In reality, however, the plan amounted to a mortgage "flipping" scheme, in which 10Spring

would acquire title to a property, the property was immediately resold to an investor at a significantly higher price, and the proceeds from that investor's mortgage loan were used to fund 10Spring's original purchase of the property.

Appellants agreed to enter into an investment with Lindberg, with Rowe Construction purchasing the lot. Rowe Construction obtained a promissory note payable to Mainstreet Bank (successor-in-interest to plaintiff Central Bank). The note was secured by a mortgage listing both the lot and the Rowes' homestead as security for the loan. The Rowes signed personal guaranties of the note.

The closing took place on May 31, 2006 at the offices of respondent TitleMark, a real-estate services company. Miles Rowe was present; Susan Zimmerman-Rowe did not attend in person but had previously signed the closing documents at her workplace. Julie Busse, an employee of respondent TitleMark, was present and acted as closing agent. Also present were representatives of New Day Capital and Mainstreet Bank.

The closing documents included a uniform residential loan application, which significantly overstated the Rowes' incomes and the values of their homestead and investment-rental property. Susan Zimmerman-Rowe stated that she signed the loan application as a blank page; Miles Rowe stated that he did not recall signing the application, but acknowledged his signature. New Day Capital verified the assets and arranged for the appraisals in connection with the sale.[1] The Rowes understood they

[1] On May 26, 2006, the Rowes closed on another lot purchased from 10Spring. That lot does not relate to this action. Susan Zimmerman-Rowe attended the earlier closing and stated that Busse told the Rowes not to mention that they had just closed on the loan for

were purchasing a lot and taking out a mortgage for $380,000, based on New Day Capital's appraisal for $385,000. After the closing, the Rowes received a payment of $25,000.

Rowe Construction defaulted on the mortgage, whereupon Mainstreet Bank filed a complaint in district court seeking foreclosure of the mortgage and payment on the note and guaranties. Appellants impleaded respondents TitleMark and Stewart Title Guaranty Company, which had provided the title insurance. Appellants alleged that Busse, as an employee of TitleMark and an agent of Stewart Title, breached a duty of care owed to appellants by misrepresenting that their homestead would not be used to collateralize the purchase of the lot. The district court granted partial summary judgment in favor of Mainstreet Bank, concluding that the bank did not owe appellants a fiduciary duty to protect them from any harm that may have resulted from their loan default and noting that appellants, as business persons who had obtained previous mortgages, should have known the significance of reviewing loan documents before signing them.

The district court granted appellants leave to file an amended third-party complaint, which alleged that: (1) TitleMark held the proceeds of the mortgage in a fiduciary capacity and that TitleMark owed appellants a fiduciary duty to observe high standards in the conduct of its insurance business; and (2) TitleMark breached those duties or acted negligently by failing to disclose all relevant information, based on its alleged knowledge that the transaction involved mortgage "flipping." The amended

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that property because she would have to make changes in the paperwork and that would delay the second closing.

complaint also alleged that TitleMark had represented 10Spring in previous transactions; knew about the inflated appraisal of the lot, which had been valued at $90,000 less when purchased by 10Spring; and used the proceeds of Rowe Construction's mortgage to fund 10Spring's purchase of the lot. The complaint also alleged that Stewart Title was vicariously liable for TitleMark's acts committed within the scope of its underwriting agreement, and that Stewart Title had breached a contract with TitleMark to issue a closing-protection letter.

TitleMark and Stewart Title moved for summary judgment. The district court granted respondents' motion for summary judgment, concluding that no genuine issues of material fact existed on the merits of appellants' arguments and that respondents were entitled to judgment as a matter of law. This appeal follows.

D E C I S I O N

Summary judgment allows a court to dispose of a claim on the merits if there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); Minn. R. Civ. P. 56. Summary judgment is proper if the pleadings, affidavits, answers to interrogatories, admissions on file, and depositions "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. If a motion for summary judgment is supported, the nonmoving party "must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

In reviewing the district court's grant of summary judgment, this court examines whether any genuine issues of material fact exist and whether the district court erred in

applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views 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). But 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*, 566 N.W.2d at 71. This court "review[s] de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

I

Breach of fiduciary duty

Appellants argue that the district court erred by granting summary judgment on their claim of breach of fiduciary duty by TitleMark through its employee, Julie Busse. In Minnesota, a "fiduciary" is a person who "enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence." *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 330–31 (Minn. App. 2007) (citing *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985)), *review denied* (Minn. Aug. 21, 2007). "Such a relationship transcends the ordinary business relationship which, if it involves reliance on a professional, surely involves a certain degree of trust and a duty of good faith and yet is not classified as 'fiduciary.'" *Id.* at 331.

This court has noted that "[s]ome types of relationships automatically give rise to a fiduciary relationship." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 914 (Minn. App. 2008), *review denied* (Minn. Jan. 20. 2009). These include attorneys and clients, trustees and beneficiaries, and limited partners and general partners. *Id*. (citations omitted). "Other types of relationships, however, may or may not give rise to a fiduciary relationship, depending on the circumstances." *Id*. (citing *Murphy v. Country House, Inc.*, 307 Minn. 344, 350, 240 N.W.2d 507, 512 (1976) (relating to business co-owners); *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 407 (Minn. App. 2007) (relating to insured and insurer), *review denied* (Minn. Dec. 11, 2007)). Whether a de facto fiduciary relationship exists generally presents a question of fact. *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009).

"Title agencies are intermediaries who perform essentially ministerial, administrative tasks associated with documenting the transactions which lenders and borrowers bring to them. They are neither the counselor nor the borrower nor the lender." *In re Johnson*, 292 B.R. 821, 829 (Bankr. E. D. Pa. 2003). Minnesota appellate courts have not adopted the position that the relationship between a loan applicant and an escrow agent gives rise to a fiduciary duty per se, and we decline to do so here. Appellants have alleged, however, that a genuine issue of material fact exists as to whether TitleMark and its employee Busse stood in a de facto fiduciary relationship with respect to appellants. Appellants allege that TitleMark and Busse had previous experience with 10Spring and knew that the value of the Carver County lot was

artificially inflated and that 10Spring was purchasing the lot with the proceeds of Rowe Construction's loan.

But appellants' allegations relating to TitleMark and Busse do not demonstrate the existence of a de facto fiduciary relationship. *See Swenson*, 764 N.W.2d at 603 (concluding that evidence did not support determination that relationship between Ph.D. candidate and academic advisor amounted to de facto fiduciary relationship). Susan Zimmerman-Rowe stated that, at the earlier closing of the additional lot, Busse told them "not to mention" that that closing had occurred because it might delay the second closing. Although this statement raises an inference that Busse knew more than she was telling appellants about the second lot closing, even if true, it fails to support an inference that TitleMark and Busse were acting as appellant's de facto fiduciaries. The record is undisputed that Rowe Construction purchased the lot from 10Spring as an investment, based on Lindberg's representation that New Day Capital would arrange the property appraisal and that the Rowes would receive $25,000. The record contains no evidence that appellants were relying on TitleMark's or Busse's professional opinions in deciding whether to purchase the lot, or that TitleMark's duties as escrow agent went beyond the mere administrative tasks of collecting and holding funds and recording documents relating to the transaction. *See* 28 Am. Jur. 2d Escrow § 27 (2000) (stating that loan depositary "has no duty to go beyond the escrow instructions and notify any party to the escrow of any suspicious fact or circumstance that may come to his or her attention"). Therefore, appellants' claims are insufficient to withstand summary judgment on this issue. *See Goward v. City of Minneapolis*, 456 N.W.2d 460, 464 (Minn. App. 1990)

(stating that at summary judgment, nonmoving party has burden to produce particular evidence of material facts for which it bears burden of proof at trial).

Violation of insurance rules

Appellants also contend that TitleMark violated Minnesota insurance regulations, which require that insurance agents observe high standards in the conduct of their business and hold funds received in connection with an insurance transaction in a fiduciary capacity. Minn. R. § 2795.1000 (2009); Minn. R. § 2795.1300 (2009). But TitleMark has provided evidence indicating that when the closing occurred, Busse was not licensed as an insurance agent in Minnesota. Additionally, these rules are intended to govern state regulation of unfair business practices in the insurance industry. *See* Minn. R. § 2795.1900 (stating that violation of these rules subjects the violator to the penalties described in the Minnesota Unfair Claims Practices Act). Furthermore, it is questionable whether these rules give rise to a private cause of action. *Cf. Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 234–38 (Minn. 1986) (concluding that no private right of action exists for violation of Minnesota Unfair Claims Practices Act). Therefore, the district court did not err by declining to apply these rules at summary judgment.

Failure to disclose material information

Appellants argue that a material factual issue exists as to whether TitleMark negligently breached a duty to disclose material facts; namely, that 10Spring was purchasing the lot for substantially less than its appraised value, that the price of the lot had significantly increased overnight with no improvements, and that the transaction was

closing "in reverse," i.e., with 10Spring using the proceeds of Rowe Construction's mortgage to buy the property.[2]

Absent certain special circumstances, one party to a business transaction has no duty to disclose material facts to the other party. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365–66, 244 N.W.2d 648, 650 (1976). "Before nondisclosure may constitute fraud . . . there must be a suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to have communicated to him." *Id.* at 365, 244 N.W.2d at 650; *see, e.g.*, *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 422, 196 N.W.2d 619, 623 (1972) (concluding that absent information that bank customer was imposing trust and confidence in bank, customer failed to make prima facie showing that banking relationship would impose duty to inform her that loan proceeds would satisfy third party's obligation).

Because a theory of failure to disclose material information sounds in fraud, it must be pleaded with particularity. Minn. R. Civ. P. 8.03, 9.02; *see Westgor v. Grimm*, 318 N.W.2d 56, 58 (Minn. 1982) (failure to particularly plead fraud justified summary judgment against party alleging that theory). Appellants' amended complaint did not allege that TitleMark committed fraud, but only that TitleMark negligently failed to provide appellants with complete information relating to their purchase of the lot. And even if fraud were properly pleaded, appellants provided no evidence suggesting that any failure to disclose information related to the imposition of trust and confidence in

[2] On appeal, appellants have not renewed their argument to the district court that respondents breached a duty by failing to disclose that the mortgage was also secured by their homestead.

TitleMark relating to the transaction. *Klein*, 293 Minn. at 422, 196 N.W.2d at 623. Appellants dealt with 10Spring representatives in deciding to purchase the lot; New Day Capital conducted the appraisal. TitleMark acted solely as closing agent, and appellants have failed to produce evidence tending to show unique and special circumstances that would impose a duty to disclose on TitleMark. *Cf. Richfield Bank*, 309 Minn. at 369, 244 N.W.2d at 652 (concluding that bank had duty to disclose only under "unique and narrow special circumstances" when bank had actual knowledge of depositors' fraudulent activity). Therefore, we affirm summary judgment on appellant's claim of failure to disclose special knowledge of material facts.

II

Appellants argue that the underwriting contract, as an agency agreement between Stewart Title and TitleMark, imposes vicarious liability on Stewart Title for actions by TitleMark or its employees relating to the closing. Because we conclude that the district court properly granted summary judgment on appellants' tort-based claims against TitleMark, this argument is moot. Even if the argument were not moot, however, appellants' argument would fail. The underwriting contract provides specifically that "[Stewart Title] appoints [TitleMark] as its limited agent only for the purpose of issuing title policies in the name of [Stewart Title]." The agreement also states that "[TitleMark] is expressly not appointed as an agent of [Stewart Title] for purposes of providing abstracting and/or escrow services, and [Stewart Title] shall have no liability or responsibility for any claims or losses due to [TitleMark] acting as principal in providing such abstracting and/or escrow services." Because the underwriting contract expressly

limits TitleMark's agency on behalf of Stewart Title to issuing title policies and disclaims liability for claims arising out of escrow services, Stewart Title may not be held vicariously liable for TitleMark's actions relating to the closing, and summary judgment on this issue was appropriate.

III

Finally, appellants argue that the district court erred by granting summary judgment on its claim that TitleMark breached a contract with Mainstreet Bank by failing to follow closing instructions to obtain a closing-protection letter from Stewart Title. Appellants maintain that the closing instructions from Mainstreet Bank required such a letter, which would have provided coverage for TitleMark's alleged misconduct. Closing-protection letters are agreements by which title insurers agree to indemnify lenders for particular losses connected to closings when conducted by an authorized agent. *First Am. Title Ins. Co. v. First Alliance Title, Inc.*, 718 F. Supp. 2d 669, 679 (E.D. Va. 2010).

For several reasons, we conclude that appellants' argument lacks merit. First, appellants have failed to produce evidence of a written agreement to provide a closing-protection letter, as required by the statute of frauds. *See* Minn. Stat. § 513.01(2) (2010) (requiring written memorandum of "every special promise to answer for the debt, default or doings of another"). Second, appellants have failed to produce evidence tending to show that, even if a closing-protection letter had been issued, it would have provided coverage for appellants' claimed losses. Stewart Title's evidence of a sample closing letter, which appellants have not challenged, provides protection for losses arising out of

a title agent's "[f]raud, dishonesty or negligence . . . in handling . . . funds or documents . . . to the extent such fraud, dishonesty or negligence relates to the status of the title to [an] interest in land or to the validity, enforceability, and priority of [a mortgage] lien." Because appellants have asserted no losses relating to the status of Rowe Construction's title or the mortgage, the existence of a closing-protection letter has no bearing on their claims. In addition, appellants have failed to show that they have suffered damages, which is an essential element of a breach-of-contract claim. *See Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 579 (Minn. App. 2004) (stating that without damages, breach-of-contract claim fails as a matter of law). Because the title policy was issued for the full appraised value of the lot, appellants have produced no evidence that they were damaged by the failure to obtain a closing-protection letter. Accordingly, the district court did not err by granting summary judgment on this issue.

Affirmed.