

2012 WL 9246995 (Minn.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Minnesota.
Tenth Judicial District
Washington County

Margaret Ann HUNTER, Plaintiffs,

v.

ANCHOR BANK, N.A. and Emigrant Mortgage Company INC., Defendants.

No. 82-CV-12-4683.
November 9, 2012.

**Anchor Bank, N.A.'s Memo of Law in Support of its Motion for Judgment
on the Pleadings and for Summary Judgment in the Alternative**

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INTRODUCTION

Defendant Anchor Bank, N.A. (“Anchor”) submits this memorandum of law in support of its motion for judgment on the pleadings and for summary judgment in the alternative (the “Motion”). Plaintiff’s Complaint is barred by the statute of limitations, the credit agreement statute and the parol evidence rule. There are no facts that Plaintiff could uncover in the course of discovery to permit her claims to survive, and as such, Anchor respectfully requests that its Motion be granted.

STATEMENT OF FACTS

The factual background has been fully recited by Defendant Emigrant Mortgage Company, Inc. (“Emigrant”) in support of its motion to dismiss and will not be restated here. The pertinent facts for the court on Anchor’s Motion are as follows:

1. Plaintiff entered into a loan transaction with Anchor on February 6, 2004 (the “Loan”). *Complaint*, ¶5.
2. In connection with the Loan, Plaintiff executed a promissory note dated February 6, 2004, in the amount of \$265,000.00 (the “Note”). *Complaint*, ¶5.
3. To secure repayment of the Note, Plaintiff executed a mortgage (the “Mortgage”) on February 6, 2004, wherein she granted Anchor a mortgage interest in property located in Inver Grove Heights (the “Inver Grove Heights Property”) and property located in Newport (the “Newport Property”). *Complaint*, ¶6; *Affidavit of Zhanna Kandel (“Kandel Aff”)*, Ex. 1.¹
4. The Note and Mortgage were assigned by Anchor to Emigrant on February 6, 2004. *Complaint*, ¶9.
5. On August 1, 2005, Plaintiff wrote to Emigrant and requested that the Inver Grove Heights Property be released as collateral for the Note. *Kandel Aff.*, Ex. 5.

6. Plaintiff commenced suit against Anchor and Emigrant on or about August 8, 2012. In the Complaint, Plaintiff alleged causes of action against Anchor for (i) fraud and misrepresentation; (ii) negligent misrepresentation; (iii) promissory estoppel; (iv) mutual mistake; and (v) **financial exploitation** of a vulnerable adult. *Complaint*.

7. The gravamen of the facts alleged to support each claim centers on Plaintiff's allegation that the Note was to be secured by a mortgage lien against the Newport Property only. *Complaint*.

As discussed below, each of the causes of action are barred by the statute of limitations, the credit agreement statute and the parol evidence rule. Accordingly, Anchor respectfully requests that its Motion be granted.

JUDGMENT ON THE PLEADINGS STANDARD

“After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” *Minn. R. Civ. P. 12.03*. A motion for judgment on the pleadings under *Minn. R. Civ. P. 12.03* was decided under the same standard as a motion to dismiss for failure to state a claim, except that a court may also consider the answer filed by the defendant. *LaVan Community Clinic of Wabasha*, 425 N.W.2d 842, 843 (Minn. Ct. App. 1988).

For *Rule 12.03* purposes, the allegations of the defendant's answer are accepted as true; based upon the assumption that the court determines whether legally sufficient claims have been stated. *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980); *D.A.B. v. Brown*, 570 N.W.2d 168, 170 (Minn. Ct. App. 1997). Despite the standard, the Court need not blindly accept a conclusory allegations or legal characterizations. *Mahney v. American Fraternal Union*, 12 N.W.2d 615, 616 (Minn. 1943) (legal conclusions are “ineffectual on a motion for judgment on the pleadings”). A pleading that lacks a legally sufficient claim for relief must be dismissed. *In Re Milk Indirect Purchaser Antitrust Litigation*, 488 N.W.2d 772, 775-76 (Minn. Ct. App. 1999).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. *Minn. R. Civ. P. 56*. In order to defeat a motion for summary judgment, the nonmoving party must show “that specific facts are in existence which create a genuine issue for trial.” *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). When a motion for summary judgment is made and supported, the adverse party must present specific facts showing that there is a genuine issue for trial. *Minn. R. Civ. P. 56.05*; see also *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 259 (Minn. Ct. App. 1996) (acknowledging standard); *Bohdan v. Alltool Mfg. Co.*, AW N.W.2d 902, 906 (Minn. Ct. App. 1987).

The party opposing a summary judgment motion must demonstrate at the time the motion is made that specific facts are in existence that create a genuine issue for trial. *Id.* If the non-moving party fails to provide the Court with specific facts indicating there are genuine issues of material fact, summary judgment is proper. *Hunt*, 384 N.W.2d at 855 (Minn. 1986). The mere existence of a factual dispute does not, by itself, make summary judgment improper. The facts in dispute must be material. *Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. Ct. App. 1986).

ARGUMENT AND AUTHORITIES

I. THE CLAIMS AGAINST ANCHOR ARE BARRED BY THE STATUTES OF LIMITATION

Statutes of limitation are “based to a great extent on the proposition that if one person has a claim against another ... it would be inequitable for him to assert such claim after an unreasonable lapse of time, during which such other person has been permitted to rest in the belief that no such claim existed.” *Bachertz v. Hayes-Luca Lumber Co.*, 275 N.W. 694, 697 (Minn. 1937). When

addressing a question as to the statute of limitations, the first step is to determine which statute applies to the claims. *Park Nicollet Clinic v. Arlyrt A. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). Once the applicable statute of limitations is determined, the next step in the analysis is to determine when the statute began to run. *Id.* The statute of limitations begins to run when “the cause of action accrues.” *Id.* (citing *Minn. Stat. § 541.01 (2010)*). A cause of action accrues when all of the elements of the action have occurred and the claims would survive a motion to dismiss. *Id.*

The six year statutes of limitation set forth in *Minn. Stat. § 541.05*, apply to each of the five causes actions asserted against Anchor.² As to the claims for promissory estoppel, mutual mistake and **financial exploitation** of a vulnerable adult, all of the elements necessary for each claim occurred at the latest on February 6, 2004, the date the Loan closed.

To establish a claim for promissory estoppel, the following elements must exist:

1. The existence of a clear and definite promise;
2. The intention of the promisor to induce the promisee to rely on the promise;
3. The promisee's detrimental reliance; and
4. That enforcement of the promise is required to prevent injustice.

Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992). In her Complaint, Plaintiff alleges that prior to entering into the Mortgage and Note she was assured by Anchor that the Mortgage would only encumber the Newport Property. The Complaint is silent as to the exact date or dates of the alleged promise. However, since the Loan closed on February 6, 2004, the alleged promise must have been made before or on that date, but prior to the execution of the Note and Mortgage. Therefore, the latest date that the alleged promise could have been made is February 6, 2004. Thus, as of February 6, 2004, all the elements were present to establish a cause of action. Anchor had allegedly made the promise by February 6, 2004, allegedly intended the promise to induce Plaintiff's reliance by February 6, 2004, and Plaintiff allegedly relied on the promise on February 6, 2004, when she signed the Note and Mortgage. Accordingly, the promissory estoppel cause of action accrued on February 6, 2004, and became time-barred six years later on February 6, 2010.

Mutual mistake requires “that both parties agree as to the content of the document but that somehow through a scrivener's error the document does not reflect that agreement.” *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn.1980). Here again, the latest that these elements occurred was February 6, 2004, the date of closing and execution of the Note and Mortgage. The mutual mistake cause of action accrued on February 6, 2004, and became time-barred on February 6, 2010.

Under *Minn. Stat. § 626.557, subd. 20*, a vulnerable adult who is the victim of **financial exploitation** has a cause of action against a person who committed the **financial exploitation**. For purposes of this Motion only, Anchor does not take issue or challenge whether Plaintiff was a vulnerable adult as of February 6, 2004 or whether the underlying transaction between Plaintiff and Anchor meet the statutory definition of **financial exploitation** set forth in *Minn. Stat. § 626.5572, subd. 9* and reserves these arguments for another day if this cause of action is permitted to proceed. In this Motion, Anchor is simply arguing that this statutory cause of action accrued on February 6, 2004, when Plaintiff entered into the Loan and executed the Note and Mortgage. Civil liability arising under a statute must be brought within six years of the date the cause of action accrued. Thus, this claim became time-barred on February 6, 2010.

The claims for fraud and negligent misrepresentation accrue when the aggrieved party learns of the facts constituting the fraud. *Minn. Stat. § 541.05, subd. 1(6)*. “The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered. *Blegan v. Monarch Life ins. Co.*, 365 N.W.2d 356, 357 (Minn. Ct. App. 1985). The failure of an aggrieved party to discover the fraud does not toll the six year statute of limitations where the aggrieved party failed to act with reasonable diligence. *Id.*

In this case, the Mortgage setting forth both the Inver Grove Heights Property and Newport Property were executed by Plaintiff of February 6, 2004. Reasonable diligence requires that a borrower and mortgagor read and understand the note and mortgage terms prior to execution. Plaintiff could or ought to have discovered that the Mortgage encumbered both the Inver Grove Heights Property and Newport Property on February 6, 2004, the date she executed the Mortgage. Accordingly, the claims for fraud and negligent misrepresentation accrued on February 6, 2004, and became time-barred on February 6, 2010.

However, even if the court does not determine that Plaintiff could or ought to have known that the Mortgage encumbered both the Inver Grove Heights Property and the Newport Property on February 6, 2004, the fraud and negligent misrepresentation claims began to run on August 1, 2005. By letter dated August 1, 2005, Plaintiff requested that Emigrant release the Inver Grove Heights Property because the tax value of the Newport Property “should be sufficient.” The letter provides uncontroverted evidence that Plaintiff was aware that all of the elements of the fraud and negligent misrepresentation claims had occurred as of August 1, 2005. Accordingly, if the court determines that the fraud and negligent misrepresentation causes of action accrued on August 1, 2005, these claims became time-barred on August 1, 2011.

II. THE CLAIMS AGAINST ANCHOR ARE BARRED BY MINN. STAT. § 513.33

The five claims against Anchor hinge on the allegation that “[p]rior to entering into the Note, Plaintiff Hunter sought and received reassurances from Defendant Anchor that neither the Mortgage nor the Note was secure by a lien on her Inver Grove Heights Property in Dakota County. *Complaint*, ¶7. Pursuant to [Minn. Stat. § 513.33](#), the alleged oral promise that the Mortgage did not encumber the Inver Grove Heights Property must be in writing. Subdivision 2 of [Minn. Stat. § 513.33](#) states that:

A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions and is signed by the creditor and debtor.

[Minn. Stat. § 513.33](#) was intended to serve a broad purpose:

The Minnesota credit agreement statute was enacted in 1985 to protect lenders from having to litigate claims of oral promises to renew agricultural loans. The farm crises of the 1980's produced cash-strapped and **financially** unsophisticated farmers who claimed reliance upon their bank officers' oral promises to renew their loans. Numerous lawsuits arose over the bankers' alleged oral promises. The credit agreement statute was passed to prevent the litigation of such difficult claims.

Rural American Bank of Greenwald v. Herickhoff, 485 N.W.2d 702 (Minn. 1992) (citations omitted). The purpose of the writing requirement is to provide reasonable safeguards and insure honest dealings. *BankCherokee v. Insignia Development, LLC*, 779 N.W.2d 896 (Minn. Ct. App. 2010).

The case lands squarely within the language and intent of the statute. Plaintiff has not alleged in her Complaint that the alleged oral promise was reduced to a writing signed by Anchor or Emigrant. In the absence of such allegation, Plaintiff's claims against Anchor are barred by [Minn. Stat. § 513.33](#).

III. PLAINTIFF'S CLAIMS AGAINST ANCHOR ARE BARRED BY THE PAROL EVIDENCE RULE

Plaintiff is prohibited from entering parol evidence to modify or alter the clear and express terms of the Mortgage. Pursuant to the parol evidence rule, evidence outside of a written agreement signed by the parties, including oral statements made prior to or contemporaneously with the execution of the agreement, is **not admissible** to modify, vary, or alter the terms of the written agreement. See *Material Movers, Inc. v. Hill*, 316 N.W.2d 13,17 (Minn. 1982). In this case, Plaintiff is attempting to advance causes of action against Anchor on the basis that she was assured that the Mortgage would not encumber the Inver Grove Heights Property. However, this alleged promise is not admissible because it is being used as an attempt to modify, vary or alter the clear

and unambiguous language in the Mortgage pertaining to the inclusion of the Inver Grove Heights Property as encumbered property. As such, the promise is inadmissible under the parol evidence rule and the claims against Anchor are therefore barred.

CONCLUSION

For the reasons stated above, Anchor respectfully requests that its Motion be granted and the causes of action asserted against it by Plaintiff in the Complaint be dismissed with prejudice.

Date: *November 8, 2012*

STEIN & MOORE, P.A.

By: <<signature>>

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Footnotes

- 1 The Affidavit of Zhanna Kandel was filed by Emigrant in support of its motion to dismiss.
- 2 The six year statute of limitations for fraud and negligent misrepresentation is found at [Minn. Stat. § 541.05, subd. 1\(6\)](#). The statute of limitations for promissory estoppel is governed by [Minn. Stat. § 541.05, subd. 1\(1\)](#) as an “other obligation”. *Deli v. Univ. of Minnesota*, 578 N.W.2d 779, 781-82 (Minn. Ct. App. 1998). A six year statute of limitations applies to claims of mutual mistake. *Sollar v. Oliver Mining Co.*, 54 N.W.2d 170, 175-76. Causes of actions arising from a statutory liability, including violation of the **financial exploitation** of a vulnerable adult statute, [Minn. Stat. § 626.557, subd. 20](#), must be brought within six years. [Minn. Stat. § 541.05, subd. 1\(2\)](#).