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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1315**

Deutsche Bank National Trust Company,
as certificate trustee on behalf of Bosco Credit II Trust Series 2010-1,
Respondent,

vs.

Diann A. Johnson,
Appellant.

**Filed April 3, 2017
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19HA-CV-16-371

Russell S. Ponessa, M. Annie Santos, Hinshaw & Culbertson LLP, Minneapolis,
Minnesota (for respondent)

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Considered and decided by Hooten, Presiding Judge; Reilly, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Respondent Deutsche Bank National Trust Company (Deutsche Bank) sued
appellant Diann Johnson for breach of contract after Johnson defaulted on a note secured
by a second mortgage. Johnson asserted two affirmative defenses: (1) the contract is void

due to fraud in the factum because Johnson was not aware of the nature of the note she signed; and (2) the interest rate on the note is usurious. Johnson also argued that the entire amount owing on the note was not recoverable because the bank never accelerated the note. The district court granted summary judgment in favor of Deutsche Bank and awarded damages based on the entire amount owing on the note, plus interest.

On appeal, Johnson argues that (1) genuine issues of material fact exist with respect to her fraud-in-the-factum defense, (2) genuine issues of material fact exist with respect to her usury defense, and (3) the district court misapplied the law in concluding that the note was accelerated. We conclude that there are no genuine issues of material fact with respect to Johnson's fraud-in-the-factum defense and that the district court properly rejected that defense on summary judgment. We also conclude that the district court properly applied the law in concluding that the note was accelerated. We conclude, however, that a genuine issue of material fact precludes summary judgment on Johnson's usury defense. We therefore affirm in part, reverse in part, and remand.

FACTS

Johnson claims that in March 2006, at the insistence of her late husband, she agreed to cosign or guarantee a note secured by a first mortgage for her mother-in-law's purchase of a house. According to Johnson, her husband presented her with several signature pages but did not provide her with the terms of the agreements. On March 15, 2006, Johnson signed a note secured by a second mortgage, pursuant to which Great Northern Financial Group, Inc. (Great Northern) agreed to loan Johnson \$44,500 at a yearly interest rate of

13.125%.¹ Johnson claims that she believed that she was cosigning only the first-mortgage note and did not realize that she was the primary obligor on both a first-mortgage note and a second-mortgage note. Johnson's mother-in-law never signed the note secured by the second mortgage, nor did Johnson's husband. Shortly after Johnson signed the note, Great Northern assigned its interest in the second-mortgage note to Deutsche Bank.

In 2008, the first mortgage was foreclosed on, and the house was sold.

The last payment that was made on the second-mortgage note occurred on April 1, 2008. As of May 1, 2008, the principal balance remaining was \$44,230.22. Johnson asserts that she never made any payments on this second-mortgage note and did not learn of its existence until 2015. Deutsche Bank sent Johnson a notice of default on July 24, 2015, demanding total payment by September 1, 2015 of \$78,635.23—representing the entire principal balance of \$43,991.74 owing as of September 1, 2009 and \$34,643.49 in interest since that date. Johnson refused to pay. Shortly thereafter, Deutsche Bank brought a breach-of-contract claim against Johnson, seeking judgment in the amount of \$78,635.23. Johnson raised the affirmative defenses of fraud in the factum and usury. Johnson further alleged that Deutsche Bank could not recover the entire amount of the loan because the bank had not properly accelerated the note.

Deutsche Bank moved for summary judgment. The district court granted Deutsche Bank's motion. The district court concluded that there were no genuine disputes of

¹ A third mortgage was later placed on the property in May 2008, which Johnson alleges is a forgery. This third mortgage is not at issue in this case and has no bearing on our decision.

material fact. It further concluded that Deutsche Bank established its claim of breach of contract. With respect to Johnson's affirmative defenses, the district court concluded that Johnson had a reasonable opportunity to learn the nature of the note before signing and therefore could not establish her fraud-in-the-factum defense, and that Johnson failed to present material facts supporting her usury defense because Johnson provided no evidence that Great Northern was not authorized to charge the note's rate of interest under Minn. Stat. § 47.20, subd. 4a (2016). Finally, the district court concluded that Deutsche Bank properly accelerated the note by seeking judgment in full in its complaint and in its summary-judgment motion.

Johnson appeals.

DECISION

On appeal from a grant of summary judgment, we review de novo (1) whether the district court properly applied the law and (2) whether there are any genuine issues of material fact that preclude summary judgment. *Riverview Muir Doran, L.L.C. v. JADT Dev. Grp., L.L.C.*, 790 N.W.2d 167, 170 (Minn. 2010). "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). No genuine issue of material fact 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. 1997) (quotation omitted). On a summary judgment motion, a court may not weigh evidence or make factual determinations; thus, if there is any evidence to support the nonmoving party's position, summary judgment must be denied. *State ex rel. Hatch v. Allina Health*

Sys., 679 N.W.2d 400, 406 (Minn. App. 2004). In reviewing the record, we view the evidence in the light most favorable to the party against whom summary judgment was entered. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

“[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *DLH, Inc.*, 566 N.W.2d at 71. The nonmoving party thus bears the burden of identifying specific facts supporting her affirmative defense. *Kessel v. Kessel*, 370 N.W.2d 889, 895 (Minn. App. 1985). But summary judgment is inappropriate if the nonmoving party “presents sufficient evidence to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted).

I. Johnson has not met her burden of establishing a genuine issue of material fact with respect to her fraud-in-the-factum defense.

Johnson argues that the district court erred in entering summary judgment on her fraud-in-the-factum defense because a genuine issue of material fact exists with respect to whether she had an opportunity to learn the true nature of the note.

Unlike fraud in the inducement, fraud in the factum concerns misrepresentations about the true nature of a negotiable instrument. Under Minnesota’s Uniform Commercial Code, an obligor sued on a note may raise the affirmative defense of fraud in the factum if fraud “induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms.” Minn. Stat. § 336.3-305(a)(1)(iii) (2016). Consistent with the language of Minn. Stat. § 336.3-305(a)(1)(iii),

the party raising the affirmative defense of fraud in the factum must establish that (1) the obligor had no knowledge of the true nature of the instrument and (2) the obligor was not afforded a reasonable opportunity to learn the true nature of the instrument. See U.C.C. § 3-305 cmt. 1 (Am. Law Inst. & Unif. Law Comm’n 2002); see also *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 366 (Minn. 2009) (citing the Uniform Commercial Code commentary as persuasive authority); *Deutsche Bank Trust Co. Americas v. Samora*, 321 P.3d 590, 598 (Colo. App. 2013) (interpreting fraud in the factum under the Uniform Commercial Code). Fraud in the factum extends to “an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms.” U.C.C. § 3-305 cmt. 1.

In assessing whether a party had a reasonable opportunity to learn the true nature of the instrument, the court should examine “all relevant factors” including

the intelligence, education, business experience, and ability to read or understand English of the signer. Also relevant is the nature of the representations that were made, whether the signer had good reason to rely on the representations or to have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to the signer, or any possibility of obtaining independent information, and the apparent necessity, or lack of it, for acting without delay.

Id. The obligor must act with “ordinary care,” *Merchants’ State Bank of Elizabeth v. Umlauf*, 160 Minn. 255, 260, 199 N.W. 819, 820 (1924), and generally fails to do so if she “signed the note voluntarily, without informing [her]self of its contents, relying wholly upon the statements of the party opposed to h[er] in the contract as to its nature and contents.” *Ward v. Johnson*, 51 Minn. 480, 482, 53 N.W. 766, 766 (1892).

Johnson alleges that her husband made two misrepresentations: (1) that she was only signing a first-mortgage note and (2) that she was a cosigner, not the primary obligor, on the second-mortgage note. But even if her husband made those representations and, based upon them, Johnson had no knowledge of the true nature of the note, Johnson still has failed to produce sufficient evidence to permit a determination that she was not afforded a reasonable opportunity to learn the true nature of the note. The signature page of the note explicitly states that the note relates to a second mortgage. Beneath Johnson's signature, Johnson is identified as the "Borrower." The signature page also states, immediately above Johnson's signature, that "[i]f more than one person signs this Note, each of us is fully and personally obligated to pay the full amount owed [A]ny one of us may be required to pay all of the amounts owed under this Note." Had Johnson read only the signature page that she signed, she would have realized that (1) she is fully liable for any debts owed under the note and (2) the note relates to a second mortgage.

Nevertheless, Johnson contends that she has produced sufficient evidence to create a genuine issue of material fact because her reliance on her husband raises questions about whether her ignorance is excusable. Relevant to the question of whether a party had an opportunity to learn about the true nature of the instrument is "whether the signer had good reason to rely on the representations or to have confidence in the person making them." U.C.C. § 3-305 cmt. 1. Johnson cites *Sorenson v. Bridge Capital Corp.*, in which a New York appellate court stated that "[t]he general rule is that in the *absence of a confidential relationship*, a party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms." 861 N.Y.S.2d 280, 282 (N.Y. App. Div. 2008)

(emphasis added) (quotation omitted). *Sorenson* itself did not find such a confidential relationship and, in fact, upheld the lower court's summary judgment because the "plaintiff had a fair opportunity to read the final agreements." In cases where negotiable instruments were voided as a result of a misrepresentation by a party in a confidential relationship, the confidential relationship was between the obligor and the obligee. *See, e.g., Cochran v. Murrah*, 219 S.E.2d 421, 423-24 (Ga. 1975) (holding that employee may be able, on theory of confidential relationship, to cancel release of claims with employer who misrepresented nature of release); *Rumfield v. Rumfield*, 324 S.W.2d 304, 306 (Tex. Civ. App. 1959) (finding fraud in the factum where nephew represented to elderly uncle that document was a will rather than a deed); *Sutton v. McMillan*, 97 S.E.2d 139, 143 (Ga. 1957) (affirming district court's cancellation of three deeds where brother obtained deeds through misrepresentations to sister).

Unlike in those cases, the confidential relationship here is not between the obligor (Johnson) and the obligee (Great Northern and its successor in interest, Deutsche Bank), but rather between Johnson and her husband. Johnson has presented no caselaw or other authority supporting the proposition that an obligor may be excused from exercising due care in signing a note because of a confidential relationship with someone who is not the obligor or the successor in interest to the obligor. Johnson has failed to show the existence of a genuine issue of material fact with respect to her fraud-in-the-factum defense, and the district court properly rejected it on summary judgment.

II. The district court erred in concluding that Johnson had not presented a genuine issue of material fact with respect to her usury defense.

Johnson argues that the district court erred in concluding that she failed to identify material facts supporting her claim that the note was usurious. The district court concluded that Johnson did not rebut the prima facie showing that Great Northern was permitted to charge a 13.125% interest rate under Minn. Stat. § 47.20, subd. 4a(a).

Usury is an affirmative defense. *Dege v. Produce Exch. Bank of St. Paul*, 212 Minn. 44, 47, 2 N.W.2d 423, 425 (Minn. 1942). In response to a summary-judgment motion, Johnson has the burden to point to “specific facts supporting [her] affirmative defense.” *Kessel*, 370 N.W.2d at 895. Whether a transaction is usurious is a question of fact. *Kantack v. Kreuer*, 280 Minn. 232, 240, 158 N.W.2d 842, 848 (1968). Four elements must be proven to establish a violation of usury laws: (1) “a loan of money or forbearance of debt,” (2) “an agreement between the parties that the principal shall be repayable absolutely,” (3) “the exaction of a greater amount of interest or profit than is allowed by law,” (4) “the presence of an intention to evade the law at the inception of the transaction.” *Citizen’s Nat’l Bank of Willmar v. Taylor*, 368 N.W.2d 913, 918 (Minn. 1985). Intent is presumed if a lender intentionally charges an interest rate that is in fact greater than permitted under the usury laws. *Id.* at 919.

The parties dispute whether Johnson has produced sufficient evidence to establish a prima facie showing of “the exaction of a greater amount of interest or profit than is allowed by law.” *Id.* at 918. The general usury statute is Minn. Stat. § 334.01, subd. 1 (2016), which provides that interest on a loan in excess of eight percent per year is usurious.

Neither party disputes that the note has an annual interest rate of 13.125% and would be usurious under Minn. Stat. § 334.01, absent an exception.

While Minn. Stat. § 334.01 is the general interest statute for loans, there “are several statutory exceptions to this interest ceiling.” *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 231, 219 N.W.2d 641, 647 (1974). Deutsche Bank suggests that the transaction is subject to an exception, but fails to specify which statutory exception permits the 13.125% rate. The district court relied on Minn. Stat. § 47.20, subd. 4a(a), which permits an authorized lender to charge a maximum interest rate equal to “the standard conventional fixed-rate mortgages published in the Wall Street Journal for the last business day of the second preceding month plus four percentage points.” Minn. Stat. § 47.20, subd. 4a(a). Neither Johnson nor Deutsche Bank submitted evidence showing whether the higher interest rate provided in Minn. Stat. § 47.20, subd. 4a(a), applies.

Johnson submitted a rate sheet listing the five interest rates for conventional home loans under Minn. Stat. § 47.20, which lists the relevant rate for March 2006 as 10.115%. Johnson argues that even if Great Northern was authorized to charge the higher rate under Minn. Stat. § 47.20, subd. 4a(a), the maximum interest rate allowed was 10.115%. The district court, however, added the statutory four percent to the 10.115% rate, which would have permitted authorized lenders to charge an interest rate of 14.115%. It is not clear from the record whether this rate sheet already included the additional statutory four percent because the rate sheet itself is unclear and neither party submitted a copy of the Wall Street Journal. On a summary-judgment motion, the district court cannot make

findings of fact and must view the evidence in the light most favorable to Johnson. *Hatch*, 679 N.W.2d at 406.

Deutsche Bank produced no evidence that Minn. Stat. § 47.20, subd. 4a(a), in fact applies or that the 13.125% interest rate is permissible under that statute or a different one. Deutsche Bank can defend against Johnson's usury defense by producing sufficient evidence to show that a relevant exception applies. But on this record, viewing the evidence in the light most favorable to Johnson, we conclude that Johnson submitted sufficient evidence to establish a prima facie case for usury under both Minn. Stat. § 334.01 and Minn. Stat. § 47.20, subd. 4a(a), and that a genuine issue of material fact exists as to whether the 13.125% interest rate is authorized, making summary judgment on that usury defense inappropriate.

III. Deutsche Bank properly accelerated the note.

The note has an optional acceleration clause, which permits Deutsche Bank to "require [Johnson] to pay immediately the full amount of principal which has not been paid and all the interest that [she] owe[s] on that amount" if Johnson defaults. Johnson argues that the district court erred in concluding that she had sufficient notice that Deutsche Bank had exercised its rights under the acceleration clause. Absent acceleration, Johnson asserts that the judgment would be limited to \$31,783.94. The district court concluded that Deutsche Bank gave Johnson sufficient notice of acceleration when it sued for the entire obligation remaining under the note and served its summary-judgment motion seeking that same amount.

Few Minnesota cases have addressed when an obligor has sufficient notice that the obligee has exercised its rights under an optional acceleration clause in a contract. See *Honn v. Nat'l Comput. Sys.*, 311 N.W.2d 1, 2 (Minn. 1981) (stating, in dicta, that “where the acceleration provision is optional,” the obligee must “unequivocally exercise[] the option”). Until the obligee exercises its rights under the acceleration clause, the obligor has the right to remedy the default by tendering payment of the amount due. *KIXX, Inc. v. Stallion Music, Inc.*, 610 P.2d 1385, 1388 (Utah 1980). The obligee “must perform some clear, unequivocal affirmative act evidencing his intention to take advantage of the accelerating provision.” *Hassler v. Account Brokers of Larimer Cty., Inc.*, 274 P.3d 547, 553 (Colo. 2012) (quotation omitted); see also *United States v. Feterl*, 849 F.2d 354, 357 (8th Cir. 1988).

The note’s terms allow Deutsche Bank to accelerate the full amount “immediately” upon Johnson’s default. In the notice-of-default letter, the complaint, and the summary-judgment motion, Deutsche Bank requested the full amount of principal and interest due under the note. Johnson relies on several statements made by Deutsche Bank throughout the proceeding to show that Deutsche Bank did not accelerate the note. Deutsche Bank stated in its notice-of-default letter that “[t]o date the Note has not been accelerated,” and Deutsche Bank’s judgment manager stated in her affidavit in support of summary judgment that “[t]he Note has neither matured nor previously been accelerated.” These statements merely show that Deutsche Bank had not accelerated the note prior to the notice-of-default letter and current litigation. But Deutsche Bank provided Johnson with clear and unequivocal notice that it was accelerating the note when it demanded the full remaining

principal and interest in the notice-of-default letter and the complaint. *Hassler*, 274 P.3d at 553. The material facts are not disputed, and the district court properly applied the law.

Because Johnson failed to produce sufficient evidence to establish a genuine issue of material fact with respect to her fraud-in-the-factum defense, we affirm the district court's rejection of this defense. Because Deutsche Bank provided Johnson with clear and unequivocal notice that it was exercising its right to accelerate the note, we affirm the district court's conclusion that Deutsche Bank properly accelerated the note. But, because Johnson presented sufficient evidence to establish a genuine issue of material fact with respect to her usury defense, we reverse and remand.

Affirmed in part, reversed in part, and remanded.