

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1491**

Mahfooz Y. Saad,
Appellant,

vs.

PNC Bank National Association, et al.,
Respondents.

**Filed May 30, 2017
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-15-9626

Bradley Kirscher, Kirscher Law Firm, PA, Roseville, Minnesota (for appellant)

David A. Schooler, Daniel J. Supalla, Cyrus C. Malek, Briggs and Morgan, P.A.,
Minneapolis, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Halbrooks, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant borrower challenges the district court's decision to grant summary judgment to respondent lenders, arguing that (1) a genuine issue of material fact exists; (2) the record supports, and he properly pleaded, his claims under the Fair Debt Collection

Practices Act (FDCPA) and Minnesota Residential Mortgage Originator and Servicer Licensing Act (Minnesota Act); and (3) there was sufficient evidence of damages. We affirm.

FACTS

In 2004, appellant Mahfooz Y. Saad took out a mortgage-secured loan from respondent National City Mortgage that required him to make monthly payments on the first day of each month but no later than the end of the 15th day each month. According to the terms of the promissory note, all payments would be applied to Saad's account in chronological order. In 2009, National City Mortgage merged into respondent PNC Bank, National Association (PNC), and PNC became successor-in-interest to Saad's mortgage. In 2013, Saad applied for a modification of his loan, and PNC approved him for a trial payment plan in which Saad agreed to make three payments that were due on November 1, 2013, December 1, 2013, and January 1, 2014. Saad satisfied the trial payment plan and PNC approved him for a permanent modification effective on January 1, 2014.

In March 2014, Saad and PNC entered into a loan-modification agreement with an effective date of January 1, 2014, that required Saad to make the first payment by February 1, 2014. PNC sent Saad an undated letter requiring him to "[m]ake an initial payment . . . by March 14, 2014." Saad made an initial payment before March 14, 2014. PNC applied this payment to the payment due in February 2014 because Saad had not yet made a loan payment for that month. Saad then made one payment per month from April to November 2014.

PNC sent Saad notices that advised him that he was one month behind on his payments in May, June, July, August, September, October, and November 2014. Because Saad was one month behind in his payments, he started accruing late fees in April 2014. When PNC did not receive a payment from Saad in December 2014, it notified him that he was in default and that it might accelerate the full amount due or pursue foreclosure.

On January 21, 2015, Saad sued respondents and requested a declaration that he was not in default and sought an injunction to prevent PNC from pursuing foreclosure, claiming: (1) two violations of the FDCPA for attempting to collect an amount not legally owed under 15 U.S.C. § 1692f (2012) and for improperly threatening foreclosure under 15 U.S.C. § 1692e (2012); (2) fraudulent or negligent misrepresentation for stating that late fees were due; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; and (5) a violation of the Fair Credit Reporting Act under 15 U.S.C. §§ 1681n, 1681o (2012).

Respondents moved for summary judgment on all of Saad's claims. Saad moved for partial summary judgment, arguing that (1) all late fees charged between April 2014 and December 2014 were misrepresentations that violated the mortgage contract and the loan-modification agreement and (2) he was not in default. The district court granted summary judgment in favor of respondents and denied Saad's motion for partial summary judgment. This appeal follows.

D E C I S I O N

Saad contends that there is a genuine issue of material fact concerning whether he was in default and that the district court improperly weighed the evidence and resolved

inferences in respondents' favor when it granted summary judgment to respondents. We disagree.

On appeal from summary judgment, we view the evidence in the light most favorable to the party against whom summary judgment was granted and review de novo whether there are any genuine issues of material fact 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, 76-77 (Minn. 2002). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 564 (Minn. 2008). But a genuine issue of material fact does not exist “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). While a district court “must not weigh the evidence on a motion for summary judgment,” it “is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *Id.* at 70.

Here, there is no genuine issue of material fact as to whether Saad was in default. Saad’s original note required him to make a “monthly payment on the 1st day of each month” but stated that he would not be subject to late fees or be in default until 15 days after the date that the payment is due. When Saad later applied for a loan modification, PNC required him to make three trial modification payments in November 2013, December

2013, and January 2014 before entering the loan-modification agreement. After he made the trial modification payments, Saad entered into a loan-modification agreement with PNC that took effect on January 1, 2014. Saad's first payment under the loan-modification agreement was due in February 2014. But because Saad did not execute the loan-modification agreement until March 2014, PNC allowed him to make the initial payment under the agreement—the February 2014 payment—by March 14, 2014.

When respondents moved for summary judgment, they attached an affidavit of one of PNC's officers that stated that on March 14, 2014, Saad paid the installment due on February 1, 2014. It also stated that, because PNC did not receive a March 2014 payment from Saad, the installment due on March 1, 2014 was paid from funds taken from a suspense account during the trial-payment-plan period. The affidavit averred that PNC did not receive an April 2014 payment. As a result, Saad's payments were late starting in May 2014.

In response, Saad submitted an affidavit and bank statements indicating that he made payments toward his mortgage in both March 2014 and April 2014. Respondents replied with an affidavit from PNC's assistant vice president that stated that the loan-modification agreement required Saad to make a payment for February 2014. Although PNC received payments from Saad in March 2014 and April 2014, he remained one month behind because PNC applied those payments to his outstanding balances from February 2014 and March 2014, respectively.

Saad contends that the two affidavits from PNC personnel create a genuine issue of material fact as to whether he was in default and asserts that the district court improperly weighed the evidence when it determined that the latter affidavit was correct.

The evidence in the record indicates that Saad failed to make one of his first three payments under the loan-modification agreement. The affidavit from PNC's officer states that Saad failed to make the April 2014 payment. The affidavit from PNC's assistant vice president states that Saad failed to make the March 2014 payment. And Saad's affidavit indicates that he failed to make the February 2014 payment. While the affidavits differ as to which payment Saad missed, a rational trier of fact, considering the record as a whole, would find that Saad was in default no later than April 2014. We therefore conclude that Saad was in default in April 2014 and that there is no genuine issue of material fact.

Saad presents multiple arguments that the district court wrongfully granted summary judgment in favor of respondents on his claims of violation of the FDCPA and the Minnesota Act, misrepresentation, breach of contract, and breach of good faith and fair dealing. The district court thoroughly analyzed each of Saad's claims. It determined that the FDCPA claims fail because respondents were not debt collectors and because Saad pleaded one of his FDCPA claims for the first time at summary judgment. It determined that Saad's Minnesota Act claim fails because he did not plead it in his complaint. And it determined that Saad's claims of misrepresentation, breach of contract, and breach of good faith and fair dealing fail because he did not allege sufficient damages. For these reasons, the district court granted summary judgment in favor of respondents and dismissed Saad's claims. Here, we have already determined that Saad was in default and we may "affirm

summary judgment on alternative theories presented but not ruled on at the district court level.” *Nelson v. Short-Elliot-Hendrickson, Inc.*, 716 N.W.2d 394, 402 (Minn. App. 2006), review denied (Minn. Sept. 19, 2006).

“A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Saad concedes that all of his claims are based on his assertion that PNC assessed late fees and sent him default notices before it had a right to do so.¹ As discussed above, the record taken as a whole establishes that Saad was in default and that PNC had a right to take action against him in April 2014. Saad received notices advising him that his payments were late and reflecting that PNC started assessing late fees in May 2014. We therefore conclude that summary judgment was proper on all of Saad’s claims and decline to address Saad’s additional arguments. See *Lipka v. Minn. Sch. Emps. Ass’n, Local 1980*, 550 N.W.2d 618, 622 (Minn. 1996)

¹ Saad’s FDCPA claims require proof that respondents threatened to “take [an] action that cannot legally be taken,” collected an amount that is not “expressly authorized by the agreement creating the debt or permitted by law,” or threatened to foreclose Saad’s mortgage without a “present right to possession of the property.” 15 U.S.C. §§ 1692e(5), 1692f(1), 1692f(6)(A). Saad’s misrepresentation claims require proof that the late notices were false. See *Hurley v. TCF Banking & Sav., F.A.*, 414 N.W.2d 584, 586 (Minn. App. 1987). Saad’s breach-of-contract claim relies on his assertion that respondents charged him late fees before his payments were late. Saad’s claim of breach of the implied covenant of good faith and fair dealing relies on his contention that respondents took action against Saad before he was in default. Saad’s Fair Credit Reporting Act claim relies on his belief that respondents reported to credit-reporting agencies that he was in default before he was in default.

(“[J]udicial restraint bids us to refrain from deciding any issue not essential to the disposition of the particular controversy before us.”); *Nelson*, 716 N.W.2d at 402.

Affirmed.