

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1142**

Scott H. Lansing,
Appellant,

vs.

Wells Fargo Bank, NA, et al.,
Respondents.

**Filed April 6, 2020
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CV-18-19611

Scott Lansing, Hopkins, Minnesota (pro se appellant)

Charles F. Webber, Jessica Z. Savran, Faegre Drinker Biddle & Reath LLP, Minneapolis,
Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's dismissal of his claims stemming from respondent-bank's foreclosure of its mortgage on his home. Because appellant failed to

plead contract and fraud claims on which relief can be granted, we affirm in part. But because appellant adequately pleaded a claim for relief under Minn. Stat. § 582.043 (2018), we reverse in part and remand.

FACTS

In 2004, appellant Scott H. Lansing purchased a home in Minnetonka, subject to a mortgage. In 2009, Lansing failed to make the required monthly payments and defaulted on the terms of the mortgage. The current mortgage holder, respondent Wells Fargo Bank NA, initiated foreclosure proceedings.¹ The home was sold at a sheriff's sale in August 2011. After the 2011 sale, Lansing sued Wells Fargo in Minnesota state court for alleged violations of Minnesota's foreclosure statutes. Wells Fargo removed the case to federal court, and the parties settled in April 2013.

In December 2018, Lansing filed a lawsuit against Wells Fargo and its officers, alleging breach of contract, violation of Minn. Stat. § 582.043, and fraud. Wells Fargo moved the district court to dismiss Lansing's complaint under Minn. R. Civ. P. 12.02(e), arguing that Lansing's claims failed as a matter of law. Wells Fargo also requested that the district court discharge a lis pendens that Lansing had filed on the property.

The district court granted Wells Fargo's motion, dismissed Lansing's complaint with prejudice, and canceled and discharged Lansing's lis pendens. Lansing appeals.

¹ Wells Fargo's foreclosure on Lansing's Minnetonka home has resulted in years of litigation. See *Wells Fargo Bank, N.A. v. Lansing*, No. A16-1263, 2017 WL 957725, at *3 (Minn. App. Mar. 13, 2017), review denied (Minn. May 30, 2017); *Wells Fargo Bank, N.A. v. Lansing*, No. A14-0868, 2015 WL 506655, at *1-3 (Minn. App. Feb. 9, 2015); see also *Lansing v. Wells Fargo Bank, N.A.*, 894 F.3d 967, 969 (8th Cir. 2018).

DECISION

A complaint “shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.” Minn. R. Civ. P. 8.01. A district court may dismiss a complaint when the plaintiff “fail[s] to state a claim upon which relief can be granted.” Minn. R. Civ. P. 12.02(e). “A Rule 12.02(e) motion raises the single question of whether the complaint states a claim upon which relief can be granted.” *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000).

“A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). “To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Id.* at 602 (emphasis omitted) (quotation omitted). It is “immaterial whether or not the plaintiff can prove the facts alleged.” *Martens*, 616 N.W.2d at 739.

“[Appellate courts] conduct a de novo review of a Rule 12 dismissal.” *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 861 (Minn. 2010). We “consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted). In reviewing a rule 12 dismissal, this court considers the complaint in its entirety, “including the facts alleged throughout the complaint and the attachments to the complaint.” *Hardin Cty. Sav. Bank v. Hous. & Redevelopment Auth. of*

City of Brainerd, 821 N.W.2d 184, 192 (Minn. 2012); *see* Minn. R. Civ. P. 10.03 (“A copy of any written instrument which is an exhibit to a pleading is a part of the statement of claim . . . set forth in the pleading”).

I.

We begin with Lansing’s claim for relief under Minn. Stat. § 582.043. That statute requires mortgage servicers to notify mortgagors of loss-mitigation options before referring a mortgage for foreclosure. Minn. Stat. § 582.043, subds. 3, 5. After receiving a request for loan modification or other loss mitigation, the servicer must “exercise reasonable diligence in obtaining documents and information from the mortgagor to complete a loss mitigation application, facilitate the submission and review of loss mitigation applications, and give the mortgagor a reasonable amount of time to provide the required documents.” *Id.*, subd. 5(2). “[U]pon the timely receipt of a loss mitigation application, [the servicer must] evaluate the mortgagor for all available loss mitigation options prior to referring a mortgage loan to an attorney for foreclosure” and “after review of the loss mitigation application, timely offer the mortgagor a loan modification if the mortgagor is eligible.” *Id.*, subd. 5(3)-(4).

Minn. Stat. § 582.043, subd. 6, generally provides that if the servicer has received a loss-mitigation application, the servicer “shall not refer the subject mortgage loan to an attorney for foreclosure,” “shall not move for an order of foreclosure, seek a foreclosure judgment, or conduct a foreclosure sale,” and “must halt [any scheduled] foreclosure sale.” *Id.*, subd. 6(a)-(c).

Minn. Stat. § 582.043, subd. 7, provides that “[a] mortgagor has a cause of action, based on a violation of this section, to enjoin or set aside a sale.” *Id.*, subd. 7(a); see *Litterer v. Rushmore Loan Mgmt. Servs., LLC*, 905 N.W.2d 623, 624 (Minn. 2018) (recognizing that the statute “creates a cause of action for mortgagors to enjoin or set aside a foreclosure sale based on a violation of section 582.043”). However, to prevail under Minn. Stat. § 582.043, subd. 7(a), “[a] lis pendens must be recorded prior to the expiration of the mortgagor’s applicable redemption period.” Minn. Stat. § 582.043, subd. 7(b). Failure to record a lis pendens before the deadline “creates a conclusive presumption that the servicer has complied with this section.” *Id.* “If the servicer complied with the statute’s requirements, plaintiffs have no basic right to sue apart from the statute.” *Litterer*, 905 N.W.2d at 628.

Lansing claims that Wells Fargo violated Minn. Stat. § 582.043 because it did not stop the foreclosure process after he submitted a loan-modification request. Lansing’s complaint set forth the following assertions in support of his claim: (1) “[t]he terms of the settlement agreement that Wells Fargo drafted and refuses to sign calls for [Lansing] to be allowed to try and modify the underlying indebtedness with Wells Fargo,” (2) “[o]n November 21, 2013, [Lansing] did send a mortgage modification request to Wells Fargo at the fax number on Wells Fargo’s modification request form,” and (3) “Wells Fargo’s loss mitigation department and the outside attorneys [it has] hired have engaged in false and fraudulent statements that Wells Fargo didn’t receive a loan modification request so that they could simply just foreclose on [Lansing],” and (4) “Wells Fargo has violated the

Loss Mitigation Mortgage Foreclosure Dual Tracking Statute in Minnesota, [Minn. Stat. § 582.043].”

In our de novo review of the sufficiency of Lansing’s claim for relief, we “consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Bahr*, 788 N.W.2d at 80 (quotation omitted). Once again, “[a] claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh*, 851 N.W.2d at 603. It is “immaterial whether or not the plaintiff can prove the facts alleged.” *Martens*, 616 N.W.2d at 739. Under those standards, Lansing’s complaint adequately pleaded a claim for relief under Minn. Stat. § 582.043.

Wells Fargo contends that Lansing’s statutory claim fails as a matter of law. As support for that contention, Wells Fargo submitted public records and documents relating to the foreclosure. Wells Fargo included a “Sheriff’s Certificate of Sale” showing that “[p]ursuant to the notice of . . . sale,” Lansing’s property was offered at public auction, the property was sold to Wells Fargo subject to a six-month redemption period from the date of confirmation by the court, and the district court “confirmed the sale” in February 2015. In addition, Wells Fargo included a copy of Lansing’s notice of lis pendens regarding his Minnetonka home, which he filed in district court in August 2015, within-the six-month redemption period. However, Wells Fargo also included an October 2018 “Order Discharging Lis Pendens,” which granted Wells Fargo’s motion to discharge Lansing’s lis

pendens. That order provided that upon filing a certified copy of the order with the county recorder, the lis pendens “shall be void and of no force or effect.”

Wells Fargo argues:

Because the lis pendens was declared “void,” it is treated as though it had never been recorded. And because it is treated legally as if it had never been recorded, Lansing failed to record a notice of lis pendens as required by [Minn. Stat. § 582.043], which triggered a “conclusive presumption that [Wells Fargo] has complied with this section” under subdivision 7(b) of the statute. Thus, Lansing’s statutory claim fails as a matter of law and public record.

(Citations omitted.)

Wells Fargo’s argument relies on the documents described above. As to those submissions, Minn. R. Civ. P. 12.02 provides:

If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Although “a court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment,” the district court is not allowed to “consider any document attached to any pleading on a motion to dismiss.” *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004) (emphasis omitted). If the district court considers documents that “were not referenced in or a part of the pleading that was the subject of the motion to dismiss,” it must treat the motion as one for summary judgment. *Id.*

Lansing’s pleading did not reference any of the foreclosure documents that Wells Fargo submitted in support of its motion to dismiss. Nonetheless, Wells Fargo relies on those documents, asserting that “[c]ourts may consider . . . information in public records on a motion to dismiss.” The cases that Wells Fargo cites as authority do not support that proposition. See *Expose v. Thad Wilderson & Assocs., P.A.*, 863 N.W.2d 95, 101 (Minn. App. 2015) (“Because the district court did not exclude the documents that are beyond the pleadings, . . . we will treat the motions as motions for summary judgment.”), *aff’d*, 889 N.W.2d 279 (Minn. 2016); *Cent. Lakes Educ. Ass’n v. Indep. Sch. Dist. No. 743*, 411 N.W.2d 875, 881 (Minn. App. 1987) (reviewing the grant of a temporary injunction and refusing to strike legislative history from a reply brief), *review denied* (Minn. Nov. 13, 1987). And we are not aware of any precedent supporting that proposition. Because Wells Fargo’s foreclosure documents were not referenced in or a part of Lansing’s pleading, they raise matters outside the pleading and cannot be considered unless Wells Fargo’s motion to dismiss is treated as one for summary judgment.

As to that treatment, the district court acknowledged Wells Fargo’s *lis pendens* argument stating, “[t]here’s something odd about the statutory language,” “[i]f it’s conclusive, why is it presumptive,” and “it’s conclusive or it’s not.” But the district court did not rely on Wells Fargo’s foreclosure-related documents or its *lis pendens* argument in dismissing Lansing’s claim for relief under Minn. Stat. § 582.043. Instead, it simply reasoned that,

Mr. Lansing believes that because he applied for a mortgage-modification request with Wells Fargo in November 2013 and foreclosure was commenced anyways, that Wells

Fargo is in violation of Minn. Stat. § 582.043. However, Minn. Stat. § 582.043, subd. 2 . . . provides that “Nothing in this section imposes a duty on a servicer to provide any mortgagor with any specific loan modification option.”

The record shows that the district court did not treat Wells Fargo’s motion as one for summary judgment. Indeed, Wells Fargo does not suggest that this court should construe the district court’s ruling as one for summary judgment, and it would be inappropriate for this court to do so. *See In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995) (rejecting request to review case as an appeal from summary judgment because “[c]onsistent with Rule 12.02, the district court did not consider in its order the expert affidavit and other matters extraneous to the pleading . . . and thus was not required to treat the motion as one for summary judgment”).

Because Wells Fargo’s foreclosure documents raised matters outside Lansing’s pleading and the district court did not consider them, we do not consider those documents or the merits of Wells Fargo’s related lis pendens argument. That argument ultimately may be resolved as a matter of law on summary judgment. But it is beyond the scope of Wells Fargo’s motion to dismiss under Minn. R. Civ. P. 12.02(e). Under the standards that govern our de novo review of that motion, Lansing’s complaint set forth a claim on which relief can be granted under Minn. Stat. § 582.043. We therefore reverse in part and remand for further proceedings on that claim.

II.

We turn to Lansing’s breach-of-contract claim, which was based on the following assertions in Lansing’s complaint: (1) “Wells Fargo and [Lansing] entered into a

settlement agreement on April 8, 2013 in U.S. District Court regarding a foreclosure on [Lansing's] property on August 30, 2011,” (2) the “[t]erms of the settlement agreement required the parties to sign a written agreement as ordered by the Court,” (3) Wells Fargo “refused to sign the settlement agreement that [it] drafted,” and (4) Wells Fargo therefore “breached the terms of [the] settlement agreement and defied the order of the Court.”

A settlement agreement is contractual and “can be enforced by an ordinary action for breach of contract.” *Mr. Steak, Inc. v. Sandquist Steaks, Inc.*, 245 N.W.2d 837, 838 (Minn. 1976). “A contract consists of a binding promise or set of promises.” *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). “A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract.” *Id.* “In order to state a claim for breach of contract, the plaintiff must show (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011). “It is not essential to the enforcement of an agreement to settle a case that the agreement be in writing,” but, the “terms of the settlement should normally be stated to the court and taken down . . . or otherwise reduced to writing so as to prevent a dispute as to what the terms of the settlement are.” *Jallen v. Agre*, 119 N.W.2d 739, 743 (Minn. 1963).

Lansing argues that Wells Fargo breached the settlement agreement by refusing to sign it, asserting that the federal magistrate judge ordered that it be signed by both parties. The record refutes Lansing's assertion. Lansing attached a transcript of the federal court settlement hearing to his complaint. According to that transcript, counsel for Wells Fargo

indicated that she wanted to “memorialize” the parties’ settlement agreement in writing and the federal magistrate judge agreed that a written agreement would be appropriate. But the federal magistrate judge also informed the parties that the agreement did not have to be signed to be enforceable, and Lansing acknowledged that the agreement was “a final and fully enforceable settlement, even in the absence of signatures.” The transcript shows that Wells Fargo’s signature was not a required term of the settlement agreement. Thus, Wells Fargo did not breach the settlement by failing to sign it.

Lansing further argues that Wells Fargo breached the settlement agreement because it “never abided by the terms of the agreement that [it] drafted in that Wells Fargo lied about not receiving a Loan Modification Application from [him] just so that [it] could foreclose.” But the parties’ agreement said nothing about loan modification. The transcript shows that the parties merely agreed that “nothing in the agreement [would] prevent [Lansing] from doing a borrower postponement affidavit.”

In sum, Lansing’s complaint failed to set forth a breach-of-contract claim on which relief can be granted.

III.

Lastly, we consider Lansing’s fraud claim, which was based on the following assertions in Lansing’s complaint: (1) the Office of the Comptroller of the Currency (OCC) ordered Wells Fargo “to make payments to homeowners for wrongdoing on the part of Wells Fargo for foreclosure and loan modification abuses”; (2) Wells Fargo sent out foreclosure-review applications to homeowners, including two to Lansing; (3) Lansing completed and returned his applications, but in January 2013, the OCC “gave up” on the

independent foreclosure-review process and “instead issued a table of damages” that Wells Fargo was to follow and “pay out [an] amount according to the table”; and (4) Wells Fargo “defrauded thousands of homeowners by putting them in the wrong category according to the OCC table and then paying out far less than what was owed.”

“[P]arties pleading fraud must meet a heightened pleading standard.” *Hardin Cty.*, 821 N.W.2d at 191. “In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.” Minn. R. Civ. P. 9.02. “To plead with particularity is to plead the ultimate facts or the facts constituting fraud” and “[a] party pleads the ultimate facts of a fraud claim when it pleads facts underlying each element of the fraud claim.” *Hardin Cty.*, 821 N.W.2d at 191 (quotations omitted). “The circumstances required to be pled with particularity under Rule 9.02 are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [the person] obtained thereby.” *Angeles v. Medtronic, Inc.*, 863 N.W.2d 404, 422 (Minn. App. 2015) (quotation omitted), *review dismissed* (Minn. Dec. 5, 2016).

The required elements of fraud action are:

(1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party’s own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer pecuniary damage as a result of the reliance.

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986).

Lansing argues that his complaint shows that Wells Fargo “defrauded” homeowners “by purposely putting people in the wrong category and paying out far less than what [it was] ordered to do.” Lansing’s complaint asserts that Wells Fargo “defrauded thousands of homeowners” and that its officers and board of directors were “complicit with the wrongdoing, fraud and criminal behavior on the part of Wells Fargo and its employees.” But Lansing’s complaint does not allege that he was one of the homeowners that Wells Fargo defrauded. Indeed, Lansing’s complaint does not allege that Wells Fargo made a false representation to him, that he relied on an allegedly false representation, or that he suffered pecuniary damages as a result of an allegedly false representation. Nor does it identify the contents of an allegedly false representation, who made it, where it was made, or when it was made. Because Lansing did not plead his fraud claim with particularity, his complaint failed to set forth a fraud claim on which relief can be granted.

In conclusion, based on our de novo review, we hold that Lansing failed to state contract and fraud claims on which relief can be granted. We therefore affirm in part. But because Lansing adequately pleaded a claim for relief under Minn. Stat. § 582.043, we reverse in part and remand for further proceedings on that claim.

Affirmed in part, reversed in part, and remanded.