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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1411**

Blue Sky Real Estate, LLC,
Appellant,

vs.

Sunrise Banks, N.A.,
f/k/a University National Bank successor by merger with
Park Midway Bank, NA f/k/a Park Midway Bank,
f/k/a Saint Anthony Park State Bank,
Respondent.

**Filed May 4, 2020
Affirmed
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CV-18-6733

Kelly Vince Griffitts, Griffitts Law Office, PLLC, Eagan, Minnesota (for appellant)

Lindsay W. Cremona, Garth G. Gavenda, Anastasi Jellum, P.A., Stillwater, Minnesota (for respondent)

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

This dispute arises from appellant Blue Sky Real Estate, LLC's purchase, for \$75,000, of respondent Sunrise Banks, N.A.'s rights under a promissory note and mortgage

after the mortgagors received a bankruptcy discharge. In its complaint, Blue Sky asserted several claims against Sunrise, seeking either to undo the purchase or to recover damages. The district court dismissed Blue Sky's complaint for failure to state a claim. Blue Sky argues that the district court erred because (1) the complaint alleges facts sufficient to show a lack of consideration for the contract and, therefore, a basis to rescind it; (2) the complaint alleges that, if a contract was formed, Sunrise breached express and implied warranties because it did not assign an existing note and mortgage and there was not \$86,443.82 due and owing as it warranted; and (3) the complaint alleges facts sufficient to justify rescission of the contract based on mutual mistake. We conclude, based on the facts as alleged in the complaint and its attached assignment agreement, that the contract was supported by consideration, that Blue Sky accepted the note and mortgage pursuant to a nonrecourse agreement in which Sunrise expressly disclaimed any warranties as to their enforceability or collectability, and that Blue Sky assumed the risk of any mutual mistake. We therefore affirm.

FACTS

Blue Sky purchased respondent Sunrise's rights under a promissory note and mortgage in August 2017. A year later, Blue Sky served a complaint alleging five counts against Sunrise: (I) breach of contract, (II) rescission of contract due to mutual mistake, (III) rescission of contract due to lack of consideration, (IV) breach of express and implied warranties, and (V) misrepresentation. Sunrise moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Minn. R. Civ. P. 12.02(e), arguing that the promissory note and mortgage were assigned by means of a nonrecourse

agreement that expressly precludes the action. The district court agreed and dismissed Blue Sky's claims with prejudice. Blue Sky now appeals. The facts as alleged in the complaint are as follows.

On November 21, 2003, Michael and Nancy Akpe obtained a loan of \$85,200 from Sunrise¹ in order to fund the operation of their business. In connection with the loan, the Akpes executed a promissory note in favor of Sunrise in the original principal amount of \$85,200. The note was secured, in part, by a mortgage in favor of Sunrise encumbering certain real property (specifically, their condominium unit) located in St. Paul (the property).

After the Akpes defaulted on their loan, Sunrise sued them under the note in Ramsey County District Court and, on July 27, 2010, obtained a judgment in the amount of \$75,982.31. Shortly thereafter, on September 17, 2010, the Akpes filed a petition for bankruptcy pursuant to chapter 13 of the United States Bankruptcy Code.² In their bankruptcy petition and schedule, the Akpes listed the property as an asset and listed Sunrise as a creditor holding an unsecured claim. Sunrise did not object to its treatment as

¹ At the time the Akpes executed the note and mortgage, it was with Park Midway Bank (formerly known as St. Anthony Park State Bank). Sometime thereafter, Park Midway Bank became known as Park Midway Bank, NA, and then it merged with University National Bank, which then changed its name to Sunrise Bank. We refer to the bank as "Sunrise" at all times for clarity.

² Chapter 13 bankruptcy, also referred to as a wage earner's plan, allows individuals with regular income to develop a plan to repay all or part of their debts over a period of three to five years. *See* 11 U.S.C. § 1322 (2018). During the plan period, creditors are forbidden from making collection efforts. 11 U.S.C. § 1301 (2018). The debtor is entitled to a discharge upon completion of all payments under the plan so long as all other statutory requirements are satisfied. 11 U.S.C. § 1328 (2018).

an unsecured creditor; in fact, on January 19, 2011, Sunrise filed a proof of claim in the Akpes' bankruptcy case indicating that its claim of \$75,982.32 was unsecured.³ The bankruptcy court entered an order confirming the Akpes' chapter 13 plan. On October 20, 2015, after completion of their chapter 13 plan, the Akpes received a discharge from the bankruptcy court.

About a year and a half later, in the summer of 2017, an agent of Blue Sky contacted a representative of Sunrise, seeking to negotiate an assignment of the note and mortgage. Blue Sky alleges that the Sunrise representative indicated to the Blue Sky agent that the mortgage was still subject to foreclosure despite the Akpes' bankruptcy. The parties, both represented by counsel, ultimately came to an agreement that Sunrise would assign the note and mortgage to Blue Sky in exchange for \$75,000. The assignment agreement, titled "NON-RECOURSE ASSIGNMENT AGREEMENT," disclaims any representations, warranties (express or implied), or recourse against Sunrise, except for four warranties specified therein. Specifically, the assignment agreement states:

Assignment and Payment. In exchange for the amount of \$75,000.00 hereby paid by Assignee to Assignor for the assignment of the Note and Mortgage, Assignor does hereby grant, bargain, sell, transfer, and assign unto Assignee,

³ "Secured claim" and "unsecured claim" are terms of art within the Bankruptcy Code. *See* 11 U.S.C. § 506(a)(1) (2018); *see also In re Okosisi*, 451 B.R. 90, 93 (Bankr. D. Nev. 2011) (explaining that "'[s]ecured claim' is a term of art within the Bankruptcy Code, and means something different than it does for a creditor to have a security interest or lien outside of bankruptcy"). Under the code, "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a *secured claim* to the extent of the value of such creditor's interest in the estate's interest . . . and is an *unsecured claim* to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." 11 U.S.C. § 506(a)(1) (emphasis added).

absolutely and not upon any condition, all such right, title, interest and claim Assignor may have in, to, and under the Note and Mortgage, to have and to hold the same unto Assignee, its successors and assigns forever, without any representation, warranty (express or implied) or recourse, against Assignor, whatsoever except as follows:

Assignor represents and warrants that: (i) it has executed no prior assignment of the Note and Mortgage; (ii) the individuals executing this Agreement have the appropriate power and authority to bind Assignor hereto; (iii) Assignor is the sole owner and holder of the Note and Mortgage; and (iv) the amount due and owing under the terms of the Note and Mortgage as of the date hereof is \$86,443.82 and interest accrues on the outstanding principal balance in the amount of \$3.03 per day. *This Agreement is made without representation or warranty of any kind except as expressly stated herein, including but not limited to, any representation or warranty regarding the enforceability or collectability of the Note and Mortgage, any default or even of default thereunder, or compliance with any applicable laws or regulations and is made without recourse whatsoever.*

(Emphasis added.) Further, the agreement specifies that Blue Sky “made its decision to purchase and take an assignment of the Note and Mortgage based upon its own independent evaluation.” Blue Sky expressly represents multiple times in the agreement that it is not relying on anything outside the four corners of the assignment agreement. The assignment agreement also states that “each Party has carefully read this Agreement and has had the opportunity to consult with their respective counsel regarding its meaning and consequences.”

About a year after the parties executed the assignment agreement, Blue Sky initiated this action. As described above, Sunrise moved to dismiss the complaint for failure to state

a claim under rule 12.02(e), and the district court granted Sunrise’s motion and dismissed Blue Sky’s claims with prejudice.

This appeal follows.

D E C I S I O N

We “review de novo the district court’s grant of a motion to dismiss under Minn. R. Civ. P. 12.02(e)” and, in so doing, “consider only the facts alleged in the complaint, accepting those facts as true.” *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013) (quotation omitted). The question is “whether the complaint sets forth a legally sufficient claim for relief.” *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Dismissal under rule 12.02(e) is appropriate 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.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quotation omitted). Courts are “not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

I. The district court properly dismissed Blue Sky’s claim that the contract should be rescinded for lack of consideration.

“The basic elements of a contract are offer, acceptance, and consideration.” *Mattice v. Minn. Prop. Ins. Placement*, 655 N.W.2d 336, 344 (Minn. App. 2002). Accordingly, “[w]hen there is a lack of consideration, no valid contract is ever formed.” *Franklin v. Carpenter*, 244 N.W.2d 492, 495 (Minn. 1976). Consideration may consist of a benefit to one party or a detriment to another party. *C & D Invs. v. Beaudoin*, 364 N.W.2d 850, 853

(Minn. App. 1985), *review denied* (Minn. June 14, 1985). Valid consideration “requires that a contractual promise be the product of a bargain.” *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661, 665 (Minn. 1960). As the supreme court has explained, though, “in this usage, ‘bargain’ does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other.” *Id.* The consideration requirement “insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation.” *Id.* Minnesota courts “follow[] the long-standing contract principle that a court will not examine the adequacy of consideration as long as something of value has passed between the parties.” *Beaudoin*, 364 N.W.2d at 853.

Blue Sky argues that the assignment agreement lacked consideration because the note and mortgage were rendered valueless by the Akpes’ bankruptcy proceedings. The complaint alleges that (1) the note “did not exist” at the time of the assignment because it was “reduced to a judgment” in the July 2010 district court proceeding and then discharged in the bankruptcy proceeding, and (2) the mortgage was “extinguished” in the bankruptcy proceeding. Blue Sky elaborates on these arguments on appeal by reference to bankruptcy law and its relationship to notes and mortgages.

Sunrise responds that consideration exists as a matter of law. It points to the provision in the agreement specifying: “In exchange for the amount of \$75,000.00 hereby paid by Assignee to Assignor for the assignment of the Note and Mortgage, Assignor does hereby grant . . . all such right, title, interest and claim Assignor *may have* in, to, and under

the Note and Mortgage” (Emphasis added.) Sunrise further observes that Blue Sky explicitly recognized the existence of consideration in the recital stating that the agreement was made “in consideration of the covenants and undertakings contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged.” Sunrise argues that Blue Sky received what it bargained for: specifically, all such right, title, interest, and claim as Sunrise *may have* in, to, and under the note and mortgage. Sunrise urges this court not to entertain Blue Sky’s bankruptcy-law analysis about the value of the note and mortgage because, Sunrise contends, Blue Sky’s arguments go towards the *enforceability or collectability*, not the existence of, the note and mortgage and, in the assignment agreement, Blue Sky explicitly disclaimed any right to recourse over “the enforceability or collectability of the Note and Mortgage.”

We conclude that Blue Sky’s lack-of-consideration argument fails as a matter of law. The assignment agreement specifically states the consideration, and Blue Sky acknowledged therein that the consideration was sufficient. The express consideration stated in the agreement is “all such right, title, interest and claim Assignor *may have* in, to, and under the Note and Mortgage,” which indicates that the parties contemplated that the note and mortgage may not have any value. Blue Sky approached Sunrise about the assignment, Blue Sky was aware of the Akpes’ bankruptcy, and the parties engaged in a bargaining process represented by counsel. The assignment agreement is the product of negotiation and voluntary assumptions of obligations by each party; the resulting bargain is not “accidental, casual, or gratuitous.” *Baehr*, 104 N.W.2d at 665. And to the extent that Blue Sky argues that the note and mortgage have little to no value because they are

unenforceable or uncollectable, Blue Sky's argument fails because it explicitly disclaimed any right to recourse over "the enforceability or collectability of the Note and Mortgage."⁴ We accordingly affirm the district court's decision to dismiss Blue Sky's claim that the contract should be rescinded for lack of consideration.

II. The district court properly dismissed Blue Sky's claim for breach of express and implied warranties.

For a plaintiff to prevail on a breach-of-warranty claim, the plaintiff must prove "the existence of a warranty, a breach, and a causal link between the breach and the alleged harm." *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982). The assignment agreement here expressly disclaims all warranties, express or implied, except the four specific warranties contained in the agreement:

Assignor represents and warrants that: (i) it has executed no prior assignment of the Note and Mortgage; (ii) the individuals executing this Agreement have the appropriate power and authority to bind Assignor hereto; (iii) Assignor is the sole owner and holder of the Note and Mortgage; and (iv) the amount due and owing under the terms of the Note and Mortgage as of the date hereof is \$86,443.82 and interest accrues on the outstanding principal balance in the amount of \$3.03 per day.

Blue Sky bases its claim on warranties (iii) and (iv). As to (iii), Blue Sky alleges in the complaint that Sunrise was not in fact the holder of a note and mortgage because the note had been "reduced to judgment and discharged" in bankruptcy and the mortgage was similarly "eliminated" through the bankruptcy proceeding. Blue Sky's allegation as to (iv)

⁴ To the extent that Blue Sky instead argues that the note and mortgage *no longer existed* at the time of assignment, this overlaps with its breach-of-warranty claim, which we analyze next.

relies on the same premise, with the complaint merely restating that the bankruptcy proceedings render the stated warranty false.

Sunrise counters that Blue Sky's argument fails because, again, it goes towards the *enforceability*, not the *existence*, of the note and mortgage, and the assignment agreement explicitly states that Blue Sky accepted the note and mortgage without "any representation or warranty regarding [their] enforceability or collectability." Sunrise argues that Blue Sky accepted the note and mortgage subject to a nonrecourse agreement and with knowledge of the Akpes' bankruptcy proceeding, and that Blue Sky had full opportunity to access the information regarding the bankruptcy before entering the assignment agreement.

The district court agreed with Sunrise, determining that "Blue Sky contracted away any ability to seek liability against Sunrise should the Note and/or Mortgage be deemed uncollectible."

To support its assertion that the note and mortgage no longer existed when the parties entered the assignment agreement, Blue Sky cites general propositions of bankruptcy law and applies them to the limited facts available regarding the Akpes' chapter 13 proceeding. For instance, it explains that a chapter 13 plan may "modify the rights of holders of secured claims," 11 U.S.C. § 1322(b)(2), and then cites cases that discuss "lien-stripping," or how a creditor's ability to proceed against property may, in some circumstances, be extinguished in bankruptcy proceedings. *See Harmon v. United States ex rel. Farmers Home Admin.*, 101 F.3d 574, 584 (8th Cir. 1996) (discussing lien-stripping under Chapter 12 bankruptcy); *In re Siemers*, 205 B.R. 583, 586 (Bankr. D. Minn. 1997) (discussing the lien-stripping effects of Chapter 13 bankruptcy).

But we conclude that a detailed analysis under the bankruptcy statutes and case law is unnecessary because Blue Sky's arguments all go towards the enforceability and collectability of the note and mortgage.⁵ The note and the mortgage exist. In the assignment agreement, Blue Sky specifically acknowledged that it was receiving a note and mortgage when it acknowledged its receipt and the sufficiency of the "good and valuable consideration" specified in the contract. And, in opposition to Sunrise's motion to dismiss, Blue Sky submitted copies of (1) the promissory note, along with various documents changing its terms; and (2) the mortgage, recorded in Ramsey County in 2003, both of which are referenced in the complaint. *Cf. Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000) (noting that courts may consider documents referenced

⁵ Sunrise asserts that analysis of Blue Sky's bankruptcy arguments is unnecessary to resolve this case but that, even if the arguments were considered, they do not change the result. Sunrise asserts that it "received no treatment in the Akpes' Chapter 13 Plan" and that, as a result, the general bankruptcy principle that a mortgage remains a lien against real property applies and thus, while the discharge order in this case voids the personal liability of the debtors, "it [did] not eliminate the existence of the debt, nor the mortgage which secures it." But the record does not contain the Akpes' bankruptcy plan, and we must evaluate a motion to dismiss under rule 12 based on the complaint. In any event, Blue Sky's arguments for the nonexistence of the mortgage rely on the concept of lien-stripping. "The term 'strip off' is colloquially used when, there being no collateral value for a mortgage, the entire lien is proposed to be avoided." *In re Fisette*, 455 B.R. 177, 179 n.1 (B.A.P. 8th Cir. 2011). But, even assuming lien-stripping occurred as a result of the Akpes' chapter 13 bankruptcy proceeding, nothing suggests that this affects the *existence* of the mortgage; the "extinguishing" language that Blue Sky highlights refers not to extinguishing *the mortgage itself*, but rather to extinguishing the *creditor's ability to proceed* against the debtor and the property. *See id.* at 186-87, 187 n.9 ("The strip off of a lien under § 1322(b)(2) is not the equivalent of receiving a discharge. . . . [A] discharge releases a debtor's *in personam* liability, but it does not affect the lien. A strip off avoids the lien, thus extinguishing a creditor's ability to proceed against the debtor *in rem*.")) (citations omitted).

in a complaint on a motion to dismiss). The issue is not the existence of the note and mortgage, it is their enforceability and collectability.

And as to that, Sunrise specifically disclaimed, in an agreement titled “NON-RECOURSE ASSIGNMENT AGREEMENT,” any representation or warranty regarding the enforceability or collectability of the note and mortgage. Whether or not Blue Sky can now foreclose on the mortgage or collect under the note following the Akpes’ bankruptcy is thus immaterial. The district court properly dismissed Blue Sky’s claim for breach of express or implied warranties.

III. The district court properly dismissed appellant’s claim for rescission of the contract based on mutual mistake.

For a contract to be rescinded based on a mutual mistake, the mistaken belief must be material and held by both parties. *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987); *N. Star Ctr., Inc. v. Sibley Bowl, Inc.*, 205 N.W.2d 331, 332 (Minn. 1973) (“Absent ambiguity, fraud, or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is no ground for rescission.”). “A material mistake of fact is one that goes to the very nature of the purchase.” *Beasley v. Medin*, 479 N.W.2d 95, 98 (Minn. App. 1992). “A mistake relating merely to the attributes, quality, or value of the subject of a sale does not warrant rescission.” *Costello v. Sykes*, 172 N.W. 907, 908 (Minn. 1919). And “[n]either does a mistake respecting something which was a matter of inducement to the making of the contract, where the means of information were open alike to both parties, and each was equally innocent, and there was no concealment of facts and

no imposition.” *Id.* A party may not avoid a contract on the grounds of mutual mistake when that party assumed the risk of mistake. *Winter*, 404 N.W.2d at 793.

Blue Sky argues that both parties were mistaken about “the subject matter of the assignment, the existence of the [m]ortgage and that the mortgage could be foreclosed.” Sunrise responds that any alleged mistake goes to the value, rather than the existence, of the note and mortgage, and courts will not rescind a contract where “[t]here was no mistake as to [the] identity or existence” of the thing exchanged, but only as to its value. *Costello*, 172 N.W. at 909.

Even assuming that Blue Sky could prove that both parties were mistaken as to the existence of the note and mortgage, Blue Sky’s claim still fails as a matter of law if Blue Sky assumed the risk of mistake. *Winter*, 404 N.W.2d at 793. In general, a party bears the risk of mistake when: (1) the agreement of the parties allocates the risk to them; (2) the party is aware, at the time the contract is made, that the party has only limited knowledge with respect to facts but treat this limited knowledge as sufficient; or (3) the court allocates the risk to the party on the ground that it is reasonable in the circumstances. Restatement (Second) of Contracts § 154 (1981); *see Winter*, 404 N.W.2d at 796. Sunrise argues that Blue Sky assumed the risk as to any mistaken belief about the note and mortgage because it accepted them pursuant to a nonrecourse assignment agreement. It argues that the nature of the nonrecourse agreement allocates the risk to the assignee and that Blue Sky had all of

the information about the Akpes' bankruptcy proceeding available before the assignment and still entered into the agreement.⁶

We conclude that Sunrise indeed assumed the risk of any mistake regarding how the bankruptcy proceeding affected the note and mortgage. The Akpes' bankruptcy discharge occurred almost two years before the assignment agreement. Blue Sky approached Sunrise about negotiating the assignment, was represented by counsel, and expressly represented in the assignment agreement that it "made its decision to purchase and take an assignment of the Note and Mortgage based upon its own independent evaluation." Under these circumstances, where the bankruptcy information was equally available to both parties and Blue Sky knew that there had been a bankruptcy proceeding, Blue Sky assumed the risk that the note and mortgage had been affected, or even extinguished, by the bankruptcy. Accordingly, the district court properly dismissed Blue Sky's claim for rescission of the contract based on mutual mistake.

Affirmed.

⁶ Blue Sky contends that Sunrise's act of filing its claim in the Akpes' bankruptcy as unsecured was "highly unusual," attempting to paint this as an anomalous and thus unforeseeable situation. As explained above, though, "secured" and "unsecured" are terms of art in the Bankruptcy Code and do not simply indicate whether a creditor has a security interest in a general sense; they turn on the value available to satisfy the claim. 11 U.S.C. § 506(a)(1); see *In re Fisette*, 455 B.R. at 182; see also *In re Okosisi*, 451 B.R. at 93. In the district court, Sunrise's counsel argued that when the Akpes filed for bankruptcy in 2010, there was in fact no value to secure Sunrise's mortgage—which was a second mortgage—in the property, perhaps due to the recent housing market crash. Regardless of whether this is true, it does not impact our analysis here; it does not change the fact that Blue Sky knew of the bankruptcy and had access to the bankruptcy case prior to entering into the assignment agreement.