

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0514**

Landmark Bank, N.A.,
Appellant,

vs.

John Klingelhutz, et al.,
Respondents.

**Filed January 4, 2021
Affirmed
Florey, Judge**

Washington County District Court
File No. 82-CV-16-2452

Jason Steck, Christopher A. Elliott, Edina, Minnesota (for appellant)

Patrick B. Steinhoff, Minneapolis, Minnesota; and

Phillip R. Krass, Eden Prairie, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

This is an appeal from judgment following a bench trial of appellant's claims against respondents arising out of a transaction that effectively extinguished appellant's lien on certain property. The district court treated appellant's claim as one to set aside the transaction based on fraud on the court. Appellant asserts that the district court erred by determining that (1) appellant had failed to plead a claim under the Minnesota Uniform

Voidable Transactions Act (MUVTA) and dismissing its complaint and alternatively (2) MUVTA does not apply because no transfer of property occurred. We affirm.

FACTS

This dispute arose over a foreclosure of real property (the Property) in 2013. The original Plaintiff, Landmark Community Bank, N.A. (the Bank), held a lien interest on the Property pursuant to a judgment against respondent John Klingelhutz, who formerly owned an undivided one-half interest in the Property. Appellant Landmark Acquisitions, LLC (appellant) is the Bank's successor in interest to that judgment.

In September 2013, a money judgment was entered against Klingelhutz in favor of the Bank for an unpaid loan agreement in the original principal amount of approximately \$403,524.42. In June 2015, the Bank conducted an execution sale of Klingelhutz's interest in the Property at which the bank bid \$50,000, even though the Bank could have made a credit bid of up to the principal amount of judgment which increased to approximately \$466,000.

In September 2015, respondent Dave Pokorney docketed a judgment (the Carver County Judgment) in Carver County District Court against Klingelhutz over an unpaid \$1,500 debt. Pursuant to this judgment, Pokorney redeemed the Property as a junior creditor of Klingelhutz by making a payment to the Bank of \$53,041.70—the amount of the Bank's bid plus applicable interest and costs. The Bank accepted the payment, making Pokorney the record fee owner of the one-half undivided interest in the Property.

In June 2016, appellant filed its summons and complaint, alleging that respondents are close friends and business associates and that they conspired to create a sham debt

between themselves, thereby fraudulently creating the Carver County Judgment in order to allow Pokorney to redeem the Property and prevent its acquisition by the Bank.

Respondents then moved to dismiss the complaint for failure to state a claim and for failure to plead fraud with particularity. The district court denied respondents' motion and allowed appellant to proceed on its Second Amended Complaint, which alleged that respondents were friends and business partners who fraudulently created the debt that resulted in the Carver County Judgment so that Pokorney could redeem Klingelhutz's half interest in the Property. Appellant sought a declaration from the district court that the Carver County Judgment was "a sham and a fraud on the Court."

Respondents moved to dismiss the Second Amended Complaint on the grounds that it did not satisfy the heightened pleading requirements for a fraud claim. In its memorandum in opposition, appellant specifically argued that it had alleged "all the ultimate facts underlying the essential elements of fraud on the court" with the particularity required by Rule 9.

The district court denied respondents' motion to dismiss, concluding that appellant had sufficiently pled "the ultimate facts underlying a fraud on the court claim." The district court characterized the relief sought by appellant in the Second Amended Complaint as follows:

Specifically, [appellant] alleges that in June 2015, [respondents] intentionally entered into a fraudulent Settlement Agreement one day after the Sheriff Sale of [the Property] and that [respondents] used this sham transaction to mislead the Carver County Court into entering a judgment in favor of Pokorney. This judgment granted Pokorney a legal basis to file a Notice of Intent to Redeem [the Property] that

Pokorney would not otherwise have possessed. If proven to be true, [respondents'] fraudulent actions resulted in a grossly unfair result, depriving plaintiff ownership of [the Property]. Accordingly, this Court concludes that [appellant] has sufficiently met its heightened pleading standard under Minn. R. Civ. P. 9.02.

The district court ordered the parties to submit a joint statement of the case. In its portion of the statement, appellant stated it would prove that respondents “conspired to obtain a sham judgment for \$1,500 from the Carver County District Court for the purpose of putting Pokorney in a position to frustrate collection of the judgement debt owed by Klingelhutz to [appellant].” Appellant further stated its intent to prove that it was “entitled under Minn. Stat. § 513.44(a) [the Minnesota Uniform Voidable Transactions Act (MUVTA)¹] and principles of equity to judgment restoring its interest in the subject property obtained as a result of the execution sale and subsequently denied by virtue of the [respondents'] scheme.” In their portion of the statement, respondents stated their intent to prove that the Carver County Judgment was not a “sham and fraud on the court” as asserted by Second Amended Complaint.

In its pretrial brief, appellant told the district court that it would pursue a claim at trial that it was “entitled under Minn. Stat. § 513.44(a) . . . and principles of equity to judgment restoring its interest in [the Property] obtained as a result of the execution sale and subsequently denied by virtue of the [respondents'] scheme.”

¹ Appellant refers to Minn. Stat. § 513.44(a) as the “Minnesota Uniform Fraudulent Transfer Act” (MUFTA) throughout his brief. However, this statute was amended in 2015 and is now cited as the Minnesota Uniform Voidable Transactions Act (MUVTA). See Minn. Stat. § 513.51 (2018).

In a motion hearing held the morning before trial (the Motion Hearing), the subject of MUVTA arose. The exchange between the court and the parties was in relevant part:

[RESPONDENT'S ATTORNEY]: Your Honor, could I ask a question? Did I understand Counsel to say he's making a claim under the Fraudulent Transfer Act? Because no such thing has ever been pled.

THE COURT: I guess I didn't understand it as that. From the beginning they have alleged, essentially, fraud regarding the series of events that have occurred here. And that's why I asked him what he meant by "transfer" and he -- and my understanding is, is that they're saying the redemption, which gave Mr. Pokorney an interest in this property, was improper and based on fraud. I don't know. Mr. Steck, anything that you want to add to that?

[APPELLANT'S ATTORNEY]: Yes, Your Honor.

THE COURT: They did not plead the Minnesota Fraudulent Transfers Act.

[APPELLANT'S ATTORNEY]: We didn't plead it and it's not in the complaint. But in our -- in the pre-trial we cited as -- the trial brief requires that we cite the basis of authority for what we're asking for and we have cited since then, Minn. Stat. 513.44, which is the Fraudulent Transfer Act.

[RESPONDENT'S ATTORNEY]: I am mystified.

THE COURT: So, you are saying that you are proceeding on that statute when you never pled it?

[APPELLANT'S ATTORNEY]: Yes, Your Honor. The pleading stated that we're asking that the redemption be set aside. That is the relief that is provided in 513.44. The fact that we didn't state the number of it doesn't change. They're put on notice; it's the nature of the claim. The relief we're asking for is the redemption be set aside, because it's fraudulent. That's what 513.44 talks about, a fraudulent transfer is void. There is the no other kind of claim that that

could relate to on that claim for relief that I'm aware of except for alleging a fraudulent transfer.

[RESPONDENT'S ATTORNEY]: Your Honor, that's not what the pleadings say. The pleadings specifically talk about the agreement of June 2, 2015, attached to the judgment the agreement between Mr. Pokorney and Mr. Klingelhutz, and -- which was used as a basis for the Court's determination that a judgment was appropriate. That's what they say to declare that as an agreement and subsequent judgment a sham and fraud. And then they say, "Declaring of virtue of his failure to redeem, Klingelhutz has no right to the property." I don't know where that comes from. Nobody ever claimed that. And, "[Respondent] Pokorney has no right to redeem from the fraudulent transaction." I'm not sure what that means. But they cannot ask for a result that may be mentioned in a statute and then claim they're relying on the statute when they never have. They didn't plead it.

[APPELLANT'S ATTORNEY]: Your Honor, Paragraph 6C of the --

THE COURT: Right. I'm looking at that. And given the notice pleading -- the notice pleading type of system we have, there's notice there, and there has been notice all along that the [appellant's] claim that Pokorney had no valid right to redeem based on all of the pieces that led up to this. Ultimately, the question is whether the bank or Acquisition can prove some type of fraud that led to the redemption. What the bank did is not bound by the Court to be some admission of what the value of the property is. That's a whole separate process in terms of foreclosure sale and the process of that. So, I think these are ultimate trial issues and I'm denying the fourth motion by the defense.

In its written closing argument, appellant argued that the evidence it presented at trial sufficiently proved the elements of a MUVTA claim. After reviewing the evidence presented at trial and the parties' submissions, the district court concluded that appellant had pleaded but failed to prove a fraud on the court claim.

In a single paragraph, the district court addressed the appellant's contention that it had brought a MUVTA claim, stating that appellant asserted "for the first time in its post-trial argument that its claim for declaratory relief was under the Minnesota Uniform Fraudulent Transfers Act." The district court determined it had no basis to analyze the case under MUVTA for at least two reasons. First, the appellant "[had] not alleged, and the evidence [did] not establish, that a transfer of the property [had] ever occurred." And second, "any claim under [MUVTA] was not properly pled." The district court noted that in the multiple motions to dismiss and amended pleadings filed in this case

nowhere in those pleadings or arguments did [appellant] ever make any mention of a claim for relief under [MUVTA]; for the Court to proceed as though [MUVTA] had ever been contemplated prior to closing arguments would ignore basic requirements of notice pleading and particularity in pleading fraud claims. See Minn. R. Civ. P. 9.02.

Accordingly, the district court proceeded in its analysis of the evidence "exclusively under the framework of fraud upon the court," concluding that the appellant failed to prove the elements of that claim. Specifically, the district court found the fraud on the court failed as a matter of law because it constituted an impermissible collateral attack on the Carver County Judgment. The district court also found that the plaintiff failed to prove the elements of a fraud-upon-the-court claim because it did not establish that respondents committed actionable fraud upon the court nor that it suffered cognizable damages.

Therefore, the district court concluded that relief was denied and that the case was dismissed.²

This appeal follows.

DECISION

I. The district court did not err by finding that appellant failed to plead a MUVTA claim.

Appellant contends that it pleaded a MUVTA claim of which respondents were on notice and that the district court erred by finding no such claim was pled. It is fundamental that a party must have notice of a claim against him or her, and an opportunity to oppose it, before a binding adverse judgment may be rendered. *See, e.g., Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983). For this reason, the issues raised at trial are generally those raised in the pleadings, *Hofer v. Hofer*, 386 N.W.2d 391, 393 (Minn. App. 1986), and there is a presumption that evidence presented by the parties relates to the issues so raised. *Folk*, 336 N.W.2d at 267. Where parties actually litigate an issue by either express or implied consent, however, the district court may allow the pleadings to be amended to conform to the evidence under Rule 15.02. *Hofer*, 386 N.W.2d at 393.

Consent may be implied either where a party fails to object to evidence inadmissible with respect to issues raised by the pleadings or where a party puts in his or her “own evidence relating to nonpleaded issues”. *Folk*, 336 N.W.2d at 267. Implied consent to litigate an issue must be “clearly indicated.” *Id.* at 367-68. The Minnesota Supreme Court

² On appeal, appellant does not contest the district court’s findings on the fraud-on-the-court claim.

has cautioned that “[l]itigation by consent is not to be applied artificially, but rather is to be implied where the novelty of the issues sought to be raised is reasonably apparent and intent to try these issues is clearly indicated by failure to object or otherwise.” *Roberge v. Cambridge Coop. Creamery Co.*, 67 N.W.2d 400, 404 (Minn. 1954). “[C]onsent to try an issue outside the pleadings cannot be implied where evidence is pertinent to issues actually made by the pleadings.” *Id.* at 403. A district court, therefore, is required to base relief only on issues either raised by the pleadings or litigated by consent. *Hofer*, 386 N.W.2d at 393.

Here, appellant contends the district court erred by determining it failed to plead a MUVTA claim until closing argument because it “had specifically ruled that the Bank had provided notice of a [MUVTA] claim.” Appellant alleges that the exchange between the judge and the parties’ attorneys at the pretrial motion hearing was in response to “[r]espondents’ argument that [appellant] had failed to plead a fraudulent-transfer claim under [MUVTA],” and that the district court “ruled” that there was notice of a MUVTA claim in the Second Amended Complaint. Appellant points in particular to the district court’s statement after appellant directed its attention to Paragraph 6(c) of the Second Amended Complaint. Paragraph 6(c) states that “[appellant] seeks a declaration of the Court as follows: Pokorney has no right to redeem from the fraudulent transaction.” The district court responded by stating:

I’m looking at that. And given the notice pleading—the notice pleading type of system we have, there’s notice there, and there has been notice all along that the plaintiffs claim that Pokorney

had no valid right to redeem based on all of the pieces that led up to this.

Appellant argues that, because Paragraph 6(c) of the Second Amended Complaint alleged that Pokorney's redemption was a "fraudulent transaction," and the district court stated that the notice-pleading standard had been met, that the court had somehow "ruled" that appellant effectively pleaded a MUVTA claim. However, the record does not demonstrate that the district court was making any conclusions at all regarding MUVTA. Paragraph 6(c) had been interpreted by the district court, along with the contents of the Second Amended Complaint as a whole, as the relief appellants sought based on their fraud-on-the-court claim. Contrary to appellant's contentions on appeal, review of the Motion Hearing record reveals that the district court found "[appellant] did not plead the Minnesota Fraudulent Transfers Act." Furthermore, at the Motion Hearing, appellant's counsel admitted that appellant did not plead a MUVTA claim and that a MUVTA claim did not appear in the Second Amended Complaint ("[w]e didn't plead it and it's not in the complaint").

Appellant also argues that, even if it did not plead a MUVTA claim, the evidence it presented at trial made it clear that it was arguing a MUVTA claim, and therefore a MUVTA claim was tried by either express or implied consent. Review of the record does not support appellant's contention that the MUVTA claim was litigated by express consent. When respondents recognized appellant's intent to assert a MUVTA claim at the Motion Hearing, they expressly objected on the grounds that the claim was not pled. The district

court also observed that a MUVTA claim had not been pled (“[appellant] did not plead the Minnesota Fraudulent Transfers Act.”).

Neither does review of the record support appellant’s contention that a MUVTA claim was litigated by implied consent. The record confirms that respondents believed they were defending against a fraud-on-the-court claim from the time litigation commenced, through the duration of trial. As such, respondents’ conduct cannot be construed as consent to try a MUVTA claim. Furthermore, the evidence presented at trial—that the debt owed by Klingelhuz to Pokorney was a sham, respondents’ purported friendship, the fortuitous timing of the debt relative to entry of appellant’s judgment against Klingelhutz, the lack of loan documents memorializing the debt, and Pokorney’s admission that he has not visited, paid expenses, or received any profit from the property since redeeming it—was pertinent to a fraud-on-the-court claim.³ See *Roberge*, 67 N.W.2d at 403 (“[C]onsent to try an issue outside the pleadings cannot be implied where the evidence is pertinent to issues actually made by the pleadings.”). It was, therefore, logical for respondents to assume that the case would be decided on the fraud-on-the-court claim. See *e.g. Id.* at 404 (“Where there is no amendment it is sufficient that timely objection be made, there being a logical assumption that the case will, nevertheless, be decided upon the issues pleaded.”).

³ The elements of a fraud-on-the-court claim are “[1] an intentional course of material misrepresentation or non-disclosure, [2] having the result of misleading the court and opposing counsel and [3] making the property settlement grossly unfair.” *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989).

Appellant further argues that the district court erred as matter of law in finding no MUTVA claim had been pled, citing case law defining the notice-pleading requirements in Minnesota to support this argument. In particular, appellant highlights the supreme court's holding in *Walsh v. US. Bank*, stating that "Minnesota is a notice-pleading state and does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." 851 N.W.2d 598, 604-605 (Minn. 2014) (quotation omitted). Appellant contends that the Second Amended Complaint "provides details that clearly identify a [MUVTA] claim" and identifies a remedy that corresponded to a MUVTA claim, namely, the voiding of the transfer between respondents.

We disagree. In its order denying respondents' motion to dismiss, the district court concluded that appellant had pled with sufficient particularity to move forward on its fraud-on-the-court claim. Moreover, in its memorandum in opposition to respondents' motion to dismiss, appellant not only provided the elements of a fraud-on-the-court claim, but also specifically argued that "the ultimate facts underlying a fraud on the court claim [were] properly alleged" and sufficient to meet the heightened pleading standard of Rule 9.02.

Appellant's contention that respondents should have been on notice that it was bringing a claim under MUVTA because the relief it sought is the relief available under MUVTA also fails. The fact that two statutes provide the same relief does not negate the pleading requirement that a party pleads information "sufficient to fairly notify the opposing party of the claim against it." See *Walsh*, 851 N.W.2d at 604-605. Our review of the record does not demonstrate that the Second Amended Complaint provided

“information sufficient to fairly notify” respondents that a MUVTA claim was being pled against them. *Id.* Therefore, the district court did not err in finding that a MUVTA claim had not been pleaded.

Appellant also contends that MUVTA was “specifically identified in [appellant’s] statement of the case and its trial brief,” and was likewise relied on at trial and in appellant’s written closing argument. Because respondents did not bring a motion to dismiss under Rule 12 at any of these “opportunities,” appellant contends respondents were on notice of the MUVTA claim. Yet, we observe that none of the documents cited by appellant as putting respondents on notice of a MUVTA claim, however, are pleadings. *See Hofer*, 386 N.W.2d at 393 (concluding that the issues raised at trial are generally those raised in the pleadings). Given the liberal rules in Minnesota allowing for amendment of pleadings, the number of times the pleadings in this case were in fact amended, the number of Rule 12 motions to dismiss that were brought, and the fact that neither respondents nor the district court ever recognized appellant’s alleged intent to bring a MUVTA claim until trial, respondents logically assumed—and the district court correctly determined—that a MUVTA claim was not brought.

Further, appellant’s counsel admitted on the record that appellant did not bring a claim under MUVTA. The district court determined that, based on the allegations in the Second Amended Complaint, appellant had pled a fraud-on-the-court claim but not a MUVTA claim. Review of the pleadings and transcript reveals that a MUVTA claim was not litigated at trial. Mere mention of appellant’s intent to plead a MUVTA claim in a preliminary joint statement of the case and one other time in a pretrial hearing was not

sufficient to put respondents on notice of appellant's intent to try a MUVTA claim. Accordingly, respondents proceeded through pretrial and trial proceedings as though defending against a fraud-on-the-court claim. Based on its review of the record and its observation of the parties' participation in the entirety of this litigation, the district court concluded that appellant's position that its purported claim was actually a MUVTA claim was inconsistent with the manner in which appellant had chosen to plead and try the case. Therefore, because the district court found, and our review of the record supports, that appellant did not plead a MUVTA claim, nor was a MUVTA claim litigated, the district court did not err by finding that appellant failed to plead a MUVTA claim.

II. The district court did not err by dismissing appellant's second amended complaint.

Appellant argues that the district court erred by "sua sponte" dismissing its Second Amended Complaint "for failure to state fraud with particularity under Minn. R. Civ. P. 9.02 in the absence of a motion." We disagree. After allowing amendments to the complaint to meet the heightened particularly requirements of Rule 9, the district court denied respondents' motion to dismiss for failure to state a fraud claim with particularity. By denying respondents' motion to dismiss, the district court accepted appellant's argument that the Second Amended Complaint stated a claim for fraud on the court with sufficient particularity to move forward on that claim. There was, however, no mention of a MUVTA claim in the filings related to the motions to dismiss. Rather, appellant specifically argued in its related filings that it had alleged "all the ultimate facts underlying the essential elements of fraud on the court" with the particularity required by Rule 9.

At the close of trial, the district court formally dismissed the complaint in its entirety after determining that appellant failed to plead a MUVTA claim and failed to prove the elements of fraud on the court. The court explained that because appellant never alleged, nor did the evidence establish, that a transfer of the property occurred and because MUVTA had not been “contemplated prior to closing arguments,” only a fraud-on-the-court claim was properly before it. Although the district court referenced Rule 9 as part of its explanation of its finding that no MUVTA claim had been pleaded, this reference explained only why there was no such claim, not that the claim failed under Rule 9.

Because we determine that a MUVTA claim was not pleaded, we need not reach the issue of whether the claim was supported by the evidence.

Affirmed.