STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0912

Dynamic Energy Solutions, LLC,
Respondent,

vs.

Danna, LLC, d/b/a Catalyst Modern Energy,
Defendant,

FK Construction Funding, LLC,
Appellant.

Filed April 3, 2023
Reversed and remanded
Gaïtas, Judge

Ramsey County District Court
File No. 62-CV-21-3534

Aron J. Frakes, Kyle W. Ubl, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent)

Daniel J. Cragg, Vince C. Reuter, Robert T. Dube Jr., Eckland & Blando LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Gaïtas, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant FK Construction Funding, LLC (FK), challenges the district court's rule 12.02(e) dismissal of its counterclaims for breach of contract and promissory estoppel

against respondent Dynamic Energy Solutions, LLC (Dynamic). FK argues that the district court erred by dismissing the breach-of-contract counterclaim for lack of consideration because FK's pleading alleges that it detrimentally relied on Dynamic's promises, which was consideration. FK also contends that the district court erroneously dismissed the alternative promissory-estoppel counterclaim because, contrary to the district court's determination, FK's pleading alleges an independent promise made by Dynamic to FK. Because FK pleaded sufficient facts to support both of its counterclaims for breach of contract and promissory estoppel, we reverse and remand.

FACTS[1]

Dynamic is a contractor for solar photovoltaic projects. For two such projects, Dynamic subcontracted work to Danna, LLC, which operates under the name Catalyst Modern Energy (Catalyst).

FK is a factoring company, which is a type of finance company. Catalyst entered into a factoring agreement with FK in July 2020. FK agreed to purchase Catalyst's accounts receivable in exchange for the right to receive payment directly from Catalyst's account debtors, including Dynamic. Under the terms of the factoring agreement, FK "may, but need not purchase from [Catalyst] such Accounts as [FK] determines to be Eligible Accounts."

[1] In reviewing a district court's grant of motions to dismiss, the appellate court accepts the factual allegations in the complaint as true. *See Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 64 n.2 (Minn. 2020). Except for facts necessary to provide context, our recitation of the facts is based on the allegations in FK's pleading and its attached exhibits, and we accept the factual allegations in those materials as true.

In a separate payment agreement between Dynamic and Catalyst, Dynamic agreed to pay FK instead of Catalyst. Between August and November 2020, Dynamic paid FK instead of Catalyst, as required by the payment agreement.[2]

Dynamic later brought multiple causes of action against Catalyst "for Catalyst's defective, deficient, and untimely performance under the Catalyst Subcontracts, including claims for material breach of the Subcontracts and breach of warranties." Catalyst failed to respond to Dynamic's complaint, and Dynamic moved for default judgment. The district court entered judgment against Catalyst, awarding Dynamic over $2 million in damages.

Dynamic also brought a declaratory judgment claim against FK regarding the rights of the parties under various agreements or purported agreements between FK and Catalyst. Dynamic sought a declaration that "FK is not entitled to any money from Dynamic because: (1) there is no contract between Dynamic and FK; (2) any estoppel claim fails as a matter of law; and (3) in any event, Dynamic is entitled to offset the damages caused to Dynamic by Catalyst, which far exceed any amount allegedly owed to FK."

In its answer to Dynamic's complaint, FK asserted counterclaims against Dynamic for breach of contract and promissory estoppel. As a factual basis for the counterclaims, FK's pleading alleges that, on three occasions between September and October 2020, Dynamic entered into three "estoppel agreements" with FK via email. On September 9, 2020, an FK employee emailed a Dynamic employee, stating, in relevant part:

[2] Although Dynamic and Catalyst entered into two separate construction subcontracts—one for each solar photovoltaic project—just one of the construction subcontracts is relevant to the issues FK raises on appeal.

> [Catalyst] has advised us that you are indebted to them on the pay application invoice amount set forth below. So that we may continue extending financial accommodations as well as funds control services to [Catalyst] in reliance on the pay application invoice amount, kindly respond-by-reply to this email with the word "Agreed" to confirm your promise and representation that
> - the contract amount including all change orders is $1,274,960.78,
> - the job is located at [an address in Illinois],
> - the pay application invoice amount is correct and will be paid to us in full within 90 days from today's date . . . .

The invoice amount was $128,558.78. The Dynamic employee, who had authority to bind Dynamic, sent a reply email stating, "Agreed." According to FK's pleading, two subsequent—and "nearly identical"—email exchanges occurred between the FK employee and the Dynamic employee involving invoice amounts of $1,500 and $19,858.[3] In total, FK's pleading alleges, Dynamic promised to pay FK $149,947.78.

For FK's breach-of-contract counterclaim, its pleading alleges:

> 29. Dynamic Energy agreed to pay FK $149,947.78 pursuant to the Estoppel Agreements.
>
> 30. As consideration for the Estoppel Agreements, Dynamic Energy induced FK to fund Catalyst to ensure that the Catalyst Subcontract could be performed and FK did indeed fund in reliance on Dynamic Energy's promise.
>
> 31. Dynamic Energy failed to pay FK any of the amounts owed to it.
>
> 32. Dynamic Energy therefore committed a breach of contract by failing to pay FK monies properly owed in an amount equal to $149,947.78 that FK was entitled to receive under the Estoppel Agreements.

[3] FK included several exhibits in support of its counterclaims, including the factoring agreement and the alleged emails between FK and Dynamic.

As to FK's promissory-estoppel counterclaim, the pleading alleges:

> 34. Dynamic Energy made clear and definite promises to FK, as detailed . . . , including an agreement to pay FK $149,947.78.
>
> 35. Dynamic energy intended to induce FK to rely upon Dynamic Energy's promises to ensure that FK funded Catalyst so that Catalyst would perform the work on Dynamic Energy's Project.
>
> 36. FK reasonably, actually, and in good faith, relied upon the promises made by Dynamic Energy to its detriment, funding Catalyst $149,947.78 that FK has not been paid back for.
>
> 37. All funds advanced to Catalyst were advanced in reliance on Dynamic Energy's promise to pay FK.

Dynamic moved to dismiss FK's counterclaims pursuant to Minnesota Rule of Civil Procedure 12.02(e). It argued that FK's pleading failed to allege facts showing that any contract existed between Dynamic and FK or that Dynamic had made any independent promises to FK.

The district court granted Dynamic's motion and dismissed FK's counterclaims with prejudice. It determined that FK's breach-of-contract counterclaim failed because there was no contract between Dynamic and FK. Specifically, the district court found that FK's pleading did not identify any consideration supporting a contract between the parties. The district court rejected FK's promissory-estoppel counterclaim because FK's pleading failed to establish that there was any independent promise to FK. Rather, according to the

district court, FK's right to payment was entirely rooted in the contract between Dynamic and Catalyst, and FK's status as an assignee of Catalyst.[4]

FK appeals the dismissal of its counterclaims against Dynamic.

DECISION

FK argues that the district court erred in dismissing FK's counterclaims against Dynamic as legally invalid. According to FK, its pleading stated sufficient grounds for both the breach-of-contract and promissory-estoppel counterclaims. Dynamic responds that the district court correctly dismissed the counterclaims because FK's pleading failed to establish the existence of a contract or any enforceable promise between Dynamic and FK.

"Minnesota is a notice-pleading state." *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 500 (Minn. 2021) (quotation omitted). A plaintiff may plead a claim "by way of a broad general statement which may express conclusions rather than, as was required under code pleading, by a statement of facts sufficient to constitute a cause of action." *Id.* (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)). "'[A]bsolute specificity in pleading' is not necessary; rather, 'information sufficient to fairly notify the opposing party of the claim against it' is satisfactory." *Id.* at 500-01 (quoting *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 917-18 (Minn. 2012)). "The focus is on the

[4] In ruling on Dynamic's motion to dismiss, the district court relied heavily on its earlier decision in a similar matter involving a factoring agreement, *Factor King, LLC v. Zenith Tech, Inc.*, No. 62-CV-19-2706, 2020 WL 4012715 (Minn. Dist. Ct. Feb. 24, 2020). The decision in that case was not appealed.

'incident' rather than on the specific facts of the incident." *Id.* at 501 (quoting *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 605 (Minn. 2014)).

When a pleading fails to state a claim upon which relief can be granted, a party may move to dismiss the pleading pursuant to Minnesota Rule of Civil Procedure 12.02(e). "[A] claim is sufficient to survive 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 600. Therefore, "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." *Franklin*, 122 N.W.2d at 29. And "courts are to construe pleadings liberally." *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 535 (Minn. 2003).

In reviewing a district court's decision to dismiss claims under rule 12.02(e), the appellate court considers de novo whether the pleading "sets forth a legally sufficient claim for relief." *Walsh*, 851 N.W.2d at 606; *see also Engstrom v. Whitebirch, Inc.*, 931 N.W.2d 786, 790 (Minn. 2019). The appellate court must "accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh*, 851 N.W.2d at 606. An appellate court will not affirm the dismissal of claims under rule 12.02(e) "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (quoting *Franklin*, 122 N.W.2d at 29).

Applying these standards, we now turn our attention to FK's two counterclaims. We address each in turn.

A. Breach of Contract

The district court determined that FK failed to adequately plead a breach-of-contract counterclaim because there was no contract between FK and Dynamic. According to the district court, a contract did not exist because FK's pleading failed to establish any consideration.

"The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008) (quoting *Com. Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006)), *rev. denied* (Minn. Jan. 20, 2009). "Determining whether sufficient consideration exists for an agreement is a question of law." *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998) (citing *Concordia Coll. Corp. v. Salvation Army*, 470 N.W.2d 542, 546 (Minn. App. 1991), *rev. denied* (Minn. Aug. 2, 1991)), *rev. denied* (Minn. Jan. 27, 1999).

"Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party." *C & D Invs. v. Beaudoin*, 364 N.W.2d 850, 853 (Minn. App. 1985), *rev. denied* (Minn. June 14, 1985). A detriment incurred need not "pass from the promisee to the promisor to be valid." *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F.2d 388, 390 (8th Cir. 1968) (citing *Ellingson v. State Bank of Hoffman*, 234 N.W. 867, 868 (Minn. 1931); *Home Supply Co. v. Ostrom*, 204 N.W. 647, 647-48 (Minn. 1925); *West v. Kidd*, 239 N.W. 157, 158 (Minn. 1931); *Estrada v. Hanson*, 10 N.W.2d 223, 225 (Minn. 1943)).

"Minnesota follows 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." *C & D Invs.*, 364 N.W.2d at 853 (citing *Estrada*, 10 N.W.2d at 225-26)). Consideration exists "if the promisee, being induced by the agreement, does anything legal which he is not bound to do . . . [.] [I]t is sufficient that something valuable flows from him, or that he suffers some prejudice or inconvenience, and that the agreement is the inducement to the transaction." *Ostrom*, 204 N.W. at 647.

In pleading its breach-of-contract counterclaim, FK stated that Dynamic "induced FK to fund Catalyst to ensure that the Catalyst Subcontract could be performed and FK did indeed fund in reliance on Dynamic Energy's promise." Dynamic argued to the district court that the counterclaim should be dismissed because FK's pleading failed to identify any benefit to Dynamic that Dynamic was not already entitled to receive under its subcontract with Catalyst. FK responded that its pleading established consideration in the form of a detriment to FK, arguing, "FK unquestionably incurred a detriment by advancing funds to Catalyst based on Dynamic's representation that it would pay those amounts to FK." Alternatively, FK contended that Dynamic benefitted from FK's advancement of funds to Catalyst because Dynamic "received the benefit of Catalyst's lower prices and continued work on the project where it otherwise might not have."

The district court concluded that FK had failed to plead consideration for any contract. According to the district court, "FK's provision of funding to Catalyst to enable Catalyst to complete its work did not provide Dynamic with any new benefit that it did not already have under the Subcontract[]."

We agree with the district court. FK maintains on appeal that Dynamic benefited because FK's funding allowed Catalyst to complete its work. However, as noted by the district court, because Catalyst was already obligated to complete the work based on the subcontract, Dynamic did not receive any additional benefit. We therefore reject FK's argument that the consideration for a contract between FK and Dynamic was Dynamic's benefit.

But the district court did not consider FK's primary argument–that FK suffered a *detriment* by relying on Dynamic's promise. FK contends that it purchased specific invoices from Catalyst in reliance on Dynamic's promise to pay FK those invoice amounts within 90 days. And, according to FK, its detrimental reliance on Dynamic's promise constituted sufficient consideration for a contract.

Dynamic responds that FK's purchase of Catalyst's invoices cannot be consideration because "there is an inherent, fatal disconnect between the alleged consideration and the actual bargain." Citing *Abbott v. Western Union Telegraph Co.* for the fundamental precept that an independent contract must be supported by independent consideration, 90 N.W. 1, 1 (Minn. 1902), Dynamic argues that FK advanced funds to Catalyst as part of the factoring agreement between FK and Catalyst, and not as part of any new contract with Dynamic.

However, Dynamic does not acknowledge that, under the terms of the factoring agreement, FK was not obligated to buy *any* invoices. And Dynamic points to no law requiring independent consideration for a party's contracts with two separate parties. The independent-consideration concept traditionally applies to additional agreements between

the same two parties to an existing contract. *See, e.g.*, *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982) (holding that a noncompete agreement separate from an employment agreement requires additional consideration beyond the consideration supporting the employment agreement).

Further, consideration can be directed to a party other than the other party to the agreement. *Southdale Ctr., Inc. v. Lewis*, 110 N.W.2d 857, 863 (Minn. 1961). For example, it is well settled under Minnesota law that a landlord or lender's extension of a lease or loan to X in reliance on Y's guaranty constitutes consideration for Y's guaranty, even if no benefit accrues to Y. *See id.* "[T]he detriment suffered by [landlord] in relying on [Y's] guaranty is in itself adequate consideration although no benefit whatever accrued to [Y]." *Id.* Notably, it does not appear to matter that X is obligated under the lease or loan to pay the landlord or lender. *See id.* The fact that the tenant or borrower gives consideration to the landlord or lender in the form of a promise to pay does not affect the conclusion that the guaranty agreement is supported by consideration in the form of the landlord or lender's detriment in entering into the lease or loan with the tenant or borrower. *See id.*; *see also Minn. Bank & Tr. v. 11 Water LLC*, No. A21-0008, 2021 WL 4059751, at *4 (Minn. App. Sept. 7, 2021) (applying *Southdale*), *rev. denied* (Minn. Dec. 14, 2021).[5]

FK's pleading alleges that it suffered a detriment by entering into a purchase of specific invoices from Catalyst in reliance on Dynamic's promise to pay FK those invoices.

[5] We are not bound by our nonprecedential opinions but may consider them as persuasive authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("Nonprecedential opinions and order opinions are not binding authority except as law of the case, res judicata, or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority.")

Under Minnesota law, the alleged detriment can be consideration for a contract. And analogizing from the guaranty realm, the fact that Catalyst provided consideration to FK for the purchases is immaterial to the issue of whether FK's detriment constitutes consideration.

Given the low pleading standard that the Minnesota Supreme Court reiterated in *Halva*, 953 N.W.2d at 500, we conclude that FK alleged sufficient consideration in the form of a detriment to survive dismissal under rule 12(e).[6] We therefore reverse the district court's dismissal of the counterclaim for breach of contract.[7]

B. Promissory Estoppel

The district court determined that FK's promissory-estoppel counterclaim failed as a matter of law. According to the district court, there were no promises between FK and Dynamic that did not already exist under express contracts, thus precluding FK's claim that a contract between Dynamic and FK should be implied.

Promissory estoppel is an equitable doctrine that applies when there are no contractual rights. *Greuling v. Wells Fargo Home Mortg. Inc.*, 690 N.W.2d 757, 761

---

[6] FK cites several nonprecedential federal decisions that, applying the laws of other states, reach a similar conclusion. "[A]lthough we are not bound to follow precedent from other states or federal courts, these authorities can be persuasive." *State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010), *rev. denied* (Minn. June 29, 2010). Because we are able to resolve the issues in this case by applying Minnesota law, we do not consider or rely on these decisions from other jurisdictions.

[7] Dynamic argued to the district court—but does not argue here—that Minnesota Statutes section 336.9-404 (2022) barred FK's breach-of-contract counterclaim. The district court determined that "FK's claims are not barred by section 336.9-404." As noted, Dynamic does not pursue its argument under section 336.9-404 here. We therefore do not address the argument or the district court's analysis of it.

(Minn. App. 2005). A promissory-estoppel claim has three elements: (1) a promise, (2) detrimental reliance, and (3) injustice. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 152 (Minn. 2001). But even when these three elements can be established, "an express contract covering the same subject matter will preclude the application of promissory estoppel." *Greuling*, 690 N.W.2d at 761. Whether a plaintiff's allegations, accepted as true, "rise to the level of promissory estoppel" presents a question of law. *Id.* An appellate court gives no deference to the district court's decisions on questions of law. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

In pleading its promissory-estoppel counterclaim, FK stated that (1) Dynamic promised to pay FK $149,947.78, (2) Dynamic "intended to induce FK to rely on [the] promises to ensure that FK funded Catalyst" so that Catalyst could fulfill its contractual obligations to Dynamic, (3) FK relied on Dynamic's promises to its detriment by "funding Catalyst $149,947.78 that FK has not been paid back," and (4) "all funds FK advanced to Catalyst were advanced in reliance on" Dynamic's promises to pay FK.

In dismissing FK's promissory-estoppel counterclaim, the district court first noted that the doctrine of promissory estoppel applies only when there are no contractual rights between the parties. *See Greuling*, 690 N.W.2d at 761. Then, relying on this fundamental principle, the district court determined that, because FK's rights as an assignee are entirely rooted in the subcontract between Catalyst and Dynamic, there could be no separate implied contract under a promissory-estoppel theory.

However, as with the breach-of-contract counterclaim, FK's pleading alleges separate promises between FK and Dynamic. FK claims that Dynamic made direct

promises to pay FK by responding to FK's emails and assuring FK that Dynamic owed the amounts FK identified. Although these promises to pay were based on FK's status as an assignee and its rights under the payment agreement between Catalyst and Dynamic, FK's pleading suggests that the promises were distinct in that they involved specific invoices and were intended to induce FK to further fund Catalyst. And FK's pleading alleges that, in reliance on Dynamic's promises, it advanced funds to Catalyst that were never paid back.

Because FK's pleading identifies promises that were separate from the payment agreement between Dynamic and Catalyst and alleges that FK detrimentally relied on these promises, we determine that it is sufficient to state a claim of promissory estoppel under Minnesota's minimal pleading standard. Indeed, FK's promissory-estoppel counterclaim is merely an equitable alternative to its breach-of-contract counterclaim. If FK can produce evidence supporting its assertion that the "estoppel agreement" emails were valid contracts, then its promissory-estoppel counterclaim will fail due to the existence of contractual rights. But if FK cannot produce such evidence, it may still have a promissory-estoppel claim based on the same promises. Accordingly, we reverse the district court's dismissal of the promissory estoppel counterclaim.

Reversed and remanded.