

*This opinion is nonprecedential except as provided by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
A22-1199**

James L. Lang, et al.,
Appellants,

vs.

Flagship Bank Minnesota
f/d/b/a Landmark Community Bank, N.A., et al.,
Respondents,

Eric Knight,
Defendant,

Mark Eliot, et al.,
Respondents,

and

John Doe, Mary Doe and XYZ Company,
persons whose identities are not yet known,
Defendants.

**Filed July 3, 2023
Affirmed; motion denied
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-19-1322

Michael C. Mahoney, Mahoney Law Firm LLC, Wayzata, Minnesota (for appellants)

Donald R. McNeil, Jeffrey A. Scott, Brian W. Varland, Elizabeth R. Scott, Heley, Duncan & Melander, PLLP, Minneapolis, Minnesota (for respondents Flagship Bank Minnesota, Jerry Moynagh, and Thomas Cross)

Tim L. Droel, Stephen F. Buterin, Droel, PLLC, Bloomington, Minnesota (for respondents Mark Eliot, Crius Corp., Eliot Mfg., Inc., and Little Pine Lake Property, LLC)

Considered and decided by Connolly, Presiding Judge; Bratvold, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant James L. Lang seeks review of a judgment after a jury trial that resolved Lang's claims deriving from many years of complicated financial dealings, including two loans. The first was Lang's 2008 loan to respondents Mark Eliot, Crius Corp., Eliot Mfg. Inc., and Little Pine Lake Property LLC (collectively, Eliot). The second loan was Lang's 2009 loan with a promissory note from respondent Flagship Bank Minnesota (Flagship). The 2009 promissory note was secured by mortgages on Lang's three lake properties, on which Flagship foreclosed in 2010 after Lang defaulted. Relying on the terms of the mortgage agreement, Flagship sold Lang's construction equipment and other personal property from two of the three lake properties. Lang asserts claims relating to both loans and also including separate conduct by two Flagship employees, respondents Jerry Moynagh and Thomas Cross.

On appeal, Lang challenges several pretrial and trial decisions, arguing that the district court erred by (1) dismissing Lang's claims against Eliot as untimely under the applicable statutes of limitations; (2) granting summary judgment against Lang on all claims against Moynagh and Cross; (3) granting summary judgment against Lang on three of Lang's claims against Flagship; (4) granting judgment as a matter of law against Lang

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

on his claims against Flagship for breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference; and (5) denying Lang's posttrial motion on damages. We affirm. Because Eliot's response brief fairly refers to Lang's second amended complaint, we also deny Lang's motion to strike the brief.

FACTS

The relevant facts of Lang's claims against each respondent are detailed below with the corresponding analysis of the legal issues that Lang raises in his brief to this court. Lang's claims focus on the two loans described above and the 2010 foreclosures on Lang's mortgages involving his lake properties in Little Pine Township (Little Pine), McGregor (Big Sandy), and Pope County (collectively, the properties). Flagship ultimately sold Little Pine and Lang's related personal property; Lang redeemed Big Sandy.

The procedural history is complicated. In January 2019, Lang served a complaint alleging Flagship, Cross, and Moynagh were liable for conversion, civil theft, and unjust enrichment, among other claims. Lang amended his complaint twice: in September 2019, when Lang served Eliot, adding him as a defendant, and in May 2020.

Eliot moved to dismiss Lang's claims under Minn. R. Civ. P. 12.02, and Moynagh and Cross moved for summary judgment. In February 2020, the district court granted Moynagh and Cross's motion for summary judgment, dismissing Lang's claims of fraud and unjust enrichment as to the real property after determining that the statute of limitations barred those claims. In November 2020, the district court also dismissed all of Lang's claims against Eliot as barred by the statute of limitations.

In July 2021, the district court granted Flagship's motion for summary judgment on Lang's claims for breach of a landlord's statutory duties under Minnesota Statutes chapter 504B, conversion of personal property at Big Sandy after Flagship foreclosed and before Lang redeemed, and fraudulent and negligent misrepresentation. In October 2021, the district court granted Moynagh and Cross's motion to reconsider their summary judgment motion; after determining the statute of limitations barred the claims, the district court then dismissed Lang's remaining claims against Moynagh and Cross involving Lang's personal property and asserting fraud and unjust enrichment.

In November 2021, the district court ruled that Lang's three claims against Flagship remained for trial, all arising from the sale of personal property from the foreclosed properties: (1) breach of contract or unjust enrichment, (2) tortious interference with prospective economic opportunity, and (3) civil theft and conversion.

Following a jury trial in February and March 2022, Flagship moved for judgment as a matter of law. The district court granted Flagship's motion in part, dismissing Lang's claims for breach of contract and tortious interference with prospective economic opportunity. The jury awarded Lang \$7,784.50 on his claim for civil theft and conversion. In a posttrial motion, Lang asked the district court to amend the judgment and award damages of \$1,731,605 or, in the alternative, grant a new trial on damages. The district court denied Lang's posttrial motion and directed entry of judgment. Lang appeals.

DECISION

I. The district court correctly dismissed all of Lang’s claims against Eliot as untimely.

On appeal, Lang argues the district court erred by determining his claims against Eliot were untimely under the applicable statutes of limitations. “When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before [appellate courts] is whether the complaint sets forth a legally sufficient claim for relief. Our review is de novo.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citation omitted). In our review, we “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). Appellate courts review the construction and application of a statute of limitations de novo. *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 831 (Minn. 2011). The first step is to “determine which statute of limitations applies to the claims asserted.” *Id.* at 832.

The operative pleading is Lang’s second amended complaint, which alleged that Lang loaned Eliot \$600,000 in the fall of 2008, due to be repaid by June 2009. Lang and Eliot orally amended the loan agreement at least three times: (1) in March 2009, Lang and Eliot agreed that Eliot would pay Lang \$800,000 by the end of February 2010; (2) in June 2009, Lang and Eliot agreed to a 6% interest rate; and (3) in June 2010, Lang and Eliot agreed that Eliot would pay Lang \$50,000 before the end of the year and “buy Lang’s properties and transfer them to Lang.” In May 2011 and in December 2012, Lang and Eliot

reaffirmed that Eliot would buy the properties and transfer them to Lang; Eliot agreed to do so by January 2013.

As stated above, Flagship foreclosed on the properties in October 2010. Lang, though, alleges he continued to “own” the properties and continued to maintain access. In January 2012, Eliot separately agreed with Flagship to buy Lang’s Little Pine property without telling Lang. In January 2012, Lang learned Flagship had changed the locks on Little Pine. Eliot bought Little Pine in April 2012. In July 2012, Lang learned that Flagship foreclosed on Little Pine and Big Sandy and that Flagship had “taken everything.” Lang alleges that Eliot also obtained the personal property that Lang had stored at Little Pine. Eliot continued to make loan payments to Lang through 2015. In May 2020, the unpaid balance of the \$600,000 loan was \$877,900.

Based on these facts, Lang alleged claims against Eliot for breach of contract, fraud, unjust enrichment, conversion, civil theft, tortious interference with prospective economic advantage, and fraudulent transfer. In response to Eliot’s motion, the district court determined that these claims were untimely and therefore dismissed the claims under Minn. R. Civ. P. 12.02(e). We discuss each of Lang’s causes of action in turn.

A. Breach of Contract

A cause of action for breach of contract must be commenced within six years of when the claim accrues. Minn. Stat. § 541.05, subd. 1(1) (2022). “A cause of action accrues when all the elements of the action have occurred, such that the cause of action could be brought and would survive a motion to dismiss for failure to state a claim.” *Hamann*, 808 N.W.2d at 832. “In order to state a claim for a breach of contract, the plaintiff must

show” (1) formation of a contract, (2) performance by plaintiff of conditions sufficient to demand performance by defendant, and (3) breach of the contract by defendant. *Id.* at 833.

Lang commenced suit against Eliot in September 2019. For his complaint to be timely, his contract claim must have accrued no earlier than September 2013. According to the second amended complaint, the 2008 loan agreement between Lang and Eliot called for Eliot to pay \$600,000 to Lang by June 30, 2009, and Eliot did not make the payment. Lang argued to the district court that his breach-of-contract claim against Eliot accrued after 2009 because the parties repeatedly amended the loan agreement. The loan was amended again in December 2012, when Eliot promised to acquire the properties and transfer them to Lang by January 2013. None of the amendments were in writing.

The district court rejected Lang’s argument after determining that the amendments to the 2008 loan were void under the statute of frauds, Minn. Stat. §§ 513.01-.07 (2022). The district court reasoned that real property “was a material term under each of the alleged loan extension agreements.” We agree with the district court that the amendments were void because they involved the sale of land, the properties on which Flagship foreclosed, and were not in writing. *See* Minn. Stat. § 513.05 (“Every contract . . . for the sale of any lands . . . shall be void unless the contract . . . is in writing . . .”). Oral contracts involving real property are unenforceable even though a party has partially performed, for example, by making payments. *See Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 899-900 (Minn. 1982).

On appeal, Lang argues that the statute of frauds does not apply because each amendment had a one-year term and could have been performed within a year. Lang is

correct that the statute of frauds excepts some agreements that may be performed within one year. *See* Minn. Stat. § 513.01(1). Because the amendments included the sale of land as a material term, however, the one-year-performance exception does not apply, and the amendments are void. *See* Minn. Stat. § 513.05. Setting aside the void amendments, Lang’s claim against Eliot accrued no later than June 2009, when Eliot failed to pay the loan.

Even if we assume that the oral amendments were valid, we then conclude that Lang’s contract claim against Eliot accrued by January 2013, when Eliot failed to transfer the properties as promised. Because Lang commenced his suit against Eliot in September 2019, more than six years after either accrual date, the district court did not err by dismissing the contract claim as untimely.

B. Fraud

A cause of action for fraud must be commenced within six years. Minn. Stat. § 541.05, subd. 1(6) (2022). A fraud claim accrues when the facts amounting to fraud could have been discovered by a plaintiff using reasonable diligence. *Bustad v. Bustad*, 116 N.W.2d 552, 555 (Minn. 1962).

As with Lang’s contract claim, Lang’s fraud claim must have accrued no earlier than September 2013 to be timely commenced in September 2019. The second amended complaint alleged that Eliot repeatedly “represented to Lang” that “Eliot had arranged for [Flagship] to sell Lang’s property, both real and personal, to Eliot”; that Eliot lied to Lang about purchasing Little Pine from Flagship; and that Eliot falsely represented to Lang that Eliot “would be able to resell, assign and convey” Little Pine to Lang by “the end of December 2012” or January 2013.

The district court determined Lang's fraud claim was untimely because "[t]he allegations in the Second Amended Complaint establish that [Lang] knew sufficient facts by the end of 2012 or early 2013 to place [Lang] on notice of [his] potential fraud claims." Because Lang's fraud claim centered on Eliot "secretly arrang[ing]" to purchase Little Pine and the associated personal property and failing to deliver that property to Lang, Lang's knowledge by "the end of 2012 or early 2013" that he was locked out of Little Pine and that his personal property was absent was enough to trigger Lang's discovery of a fraud claim under a reasonable-diligence standard.

On appeal, Lang argues that the district court erred by relying on Lang's knowledge at the "beginning of 2013" because the finding is too vague. Lang misconstrues the district court's analysis. The district court determined that Lang's allegation in the second amended complaint that Eliot "wrongfully refused to deliver Lang's property to Lang in 2012" was enough to "trigger[] an obligation to investigate the potential fraud." Indeed, Lang knew in 2012 that he was locked out of Little Pine and Big Sandy, the properties had been foreclosed, and that his personal property had been "taken," and Eliot had failed to deliver on the alleged agreement to transfer the real and personal property to Lang no later than January 2013.

Because Lang had sufficient knowledge to put him on notice of a fraud claim against Eliot "by the end of 2012 or early 2013" and because he did not commence his suit against Lang until September 2019, which is more than six years after either accrual date, the district court did not err by dismissing Lang's fraud claim as untimely under Minn. Stat. § 541.05, subd. 1(6).

C. Unjust Enrichment

An unjust-enrichment claim must be commenced within six years of when it accrues. Minn. § 541.05, subd. 1(1). An unjust-enrichment claim accrues when the plaintiff is damaged. *Block v. Litchy*, 428 N.W.2d 850, 854 (Minn. App. 1988). As with the contract and fraud claims, Lang’s unjust-enrichment claim must have accrued no earlier than September 2013 to be timely commenced in September 2019.

Lang argues that Eliot was unjustly enriched in 2018 when he sold Little Pine, and therefore, the six-year statute of limitations had not expired when Lang commenced his suit against Eliot in September 2019. Lang’s argument is unpersuasive. As the district court determined, the second amended complaint alleged Eliot was unjustly enriched when he acquired Little Pine from Flagship without informing Lang and without transferring it to Lang as Eliot had promised. Because Lang was damaged when Eliot acquired Little Pine in 2012 and failed to transfer the property to Lang by January 2013 as promised, the six-year statute of limitations expired before Lang commenced his suit against Eliot in September 2019. The district court therefore did not err by dismissing Lang’s unjust-enrichment claim as untimely.

D. Conversion and Civil Theft

Lang’s claims for conversion and civil theft involve the same theory, so we consider them together. “A party must bring an action within six years ‘[f]or taking, detaining or injuring personal property.’” *Franklin Auto Body Co. v. Wicker*, 414 N.W.2d 509, 511 (Minn. App. 1987) (quoting Minn. Stat. § 541.05, subd. 1(4) (1978)). A conversion claim accrues when the personal property is sold or when the possessor exercises any act of

dominion against the rights of the owner. *Id.* A claim for civil theft must be commenced within the six-year statute of limitations under Minn. Stat. § 541.05, subd. 1(4) (2022). An intentional-tort claim, which is analogous to civil theft, ordinarily accrues on the date of the tortious act. *Krause v. Farber*, 379 N.W.2d 93, 97 (Minn. App. 1985), *rev. denied* (Minn. Feb. 14, 1986).

As with Lang’s contract, fraud, and unjust-enrichment claims, Lang’s conversion and civil-theft claims must have accrued no earlier than September 2013 to be timely commenced in September 2019. According to the second amended complaint, Eliot converted or stole Lang’s personal property when Eliot “wrongfully refused to deliver Lang’s property to Lang in 2012 when [Eliot] took control of what had been Lang’s Little Pine personal property.” Eliot exercised dominion over the personal property and committed a tortious act no later than when he failed to transfer the personal property in January 2013 as promised. Thus, the district court correctly determined that Lang’s conversion and civil-theft claims were untimely commenced in September 2019, more than six years after their accrual.

E. Tortious Interference

A claim for tortious interference with prospective economic advantage is subject to a six-year statute of limitations. *Wallin v. Minn. Dep’t of Corr.*, 598 N.W.2d 393, 401 (Minn. App. 1999) (applying the six-year statute of limitations in Minn. Stat. § 541.05 to a tortious-interference-with-contract claim), *rev. denied* (Minn. Oct. 21, 1999). This claim accrues on the date of the alleged tortious act. *Krause*, 379 N.W.2d at 97.

As with the other claims discussed above, Lang’s tortious-interference claim must have accrued no earlier than September 2013 to be timely commenced in September 2019. In the second amended complaint, Lang argues that Eliot interfered with his potential for future rental income from Little Pine. For the reasons already discussed, Lang’s tortious-interference claim against Eliot accrued no later than January 2013 when Eliot did not transfer Little Pine to Lang as promised. Because Lang commenced the claim against Eliot more than six years later, in September 2019, the district court did not err by dismissing the claim as untimely.

F. Fraudulent Transfer

The statute of limitations for a cause of action for fraudulent transfer is six years. Minn. Stat. § 541.05, subd 1(6). Courts apply a reasonable-diligence standard to determine when a plaintiff could or ought to have discovered facts constituting fraud. *Bustad*, 116 N.W.2d at 555.

As with the other claims discussed above, Lang’s fraudulent-transfer claim must have accrued no earlier than September 2013 to be timely commenced in September 2019. The district court determined that “the transfers involving [Eliot], as alleged by [Lang], occurred in 2012, and [Lang was] aware of them by July 2012.” The district court also determined that Lang “knew by the end of 2012 that [Eliot] had not returned any of the allegedly fraudulently transferred property to [Lang].”

On appeal, Lang argues that the district court erred because Eliot sold the personal property in 2018. The second amended complaint, however, alleged that Lang’s personal property was transferred to Eliot when Flagship sold Little Pine to Eliot in April 2012.

Although Lang alleged that he did not learn of the transfer until 2019, the duty to investigate with reasonable diligence, discussed above, also applies here. Lang knew by July 2012 that Flagship had foreclosed on the real property and that his personal property had been “taken.” Lang also knew no later than January 2013 that Eliot had not transferred the personal property to Lang as promised. Because Lang was aware of the facts underlying the fraudulent-transfer claim no later than January 2013 and did not commence his action against Eliot until September 2019, the district court did not err by dismissing the claim as untimely.

In the district court and again on appeal, Lang argues that the statute of limitations on each claim is tolled because of “the active fraud of [Eliot] that make[s] it difficult or impossible for a party like [Lang] to discover the facts.” “A statute of limitations may be tolled if the cause of action is fraudulently concealed by the defendant.” *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. App. 1992), *rev. denied* (Minn. Aug. 4, 1992); *accord Minn. Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014). “Fraudulent concealment tolls the statute of limitations until the party discovers, or has a reasonable opportunity to discover, the concealed defect.” *Minn. Laborers*, 844 N.W.2d at 514 (quotation omitted). As already discussed, with the exercise of reasonable diligence, Lang had reasonable notice of Eliot’s fraud as of July 2012 and no later than January 2013. The district court therefore did not err by rejecting Lang’s fraudulent-concealment argument and dismissing Lang’s fraudulent-transfer claim as untimely.

II. The district court correctly granted summary judgment rejecting Lang's claims against Moynagh and Cross as untimely.

“We review a district court’s summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). Moynagh and Cross referred to facts Lang alleged in the September 2019 first amended complaint. If a fact is admitted in the pleadings, that admission stands in the place of evidence. *Phelps v. Benson*, 90 N.W.2d 533, 548 (Minn. 1958); see *JEM Acres, LLC v. Bruno*, 764 N.W.2d 77, 81 (Minn. App. 2009) (citing *Phelps* to conclude that a party’s standing to sue was established despite a lack of documentary evidence because the other party’s pleading admitted the facts demonstrating standing).

Lang commenced different claims against Moynagh and Cross at different times: (1) unjust enrichment in the January 2019 original complaint and (2) fraudulent concealment in the September 2019 first amended complaint. Both claims related to real and personal property. In February 2020, the district court dismissed both claims as they related to Lang’s real property. In October 2021, the district court granted Moynagh and Cross’s request to reconsider and then granted their summary-judgment motion on Lang’s personal-property claims. Lang appeals the district court’s October 2021 decision relating to the personal property.

The district court’s summary-judgment decision determined that Lang’s unjust-enrichment and fraudulent-concealment claims were untimely and relied on facts

that were either undisputed or viewed in a light favorable to Lang. Lang's 2008 loan from Flagship was secured by the properties and is discussed above. Moynagh served as the loan officer and was Lang's contact at Flagship; Cross was responsible for collection on the loan. After Lang defaulted on his loan, Flagship foreclosed in October 2010. Flagship became the owner of Little Pine and the personal property remaining on the property as of October 2011.

In the second amended complaint, Lang alleged that Moynagh and Cross made false representations leading Lang to believe that he still owned Little Pine in late 2011 and early 2012. Lang also alleged that in March 2012, after he demanded to know where his personal property from Little Pine was, Cross told Lang that Flagship "had the right to keep Lang's personal property." Lang admitted in the second amended complaint that by July 2012, he knew Flagship "had taken everything," including "all of Lang's equipment."¹ With this background, we address Lang's arguments about the timeliness of his fraud and unjust-enrichment claims.

A. Fraud

As discussed above, fraud claims must be brought within the six-year statute of limitations. Minn. Stat. § 541.05, subd. 1(6). Courts apply a reasonable-diligence standard to determine when a plaintiff "could and ought to have" discovered facts constituting fraud. *Bustad*, 116 N.W.2d at 555. To timely commence his fraud claims against Moynagh and

¹ Lang's admission is found in the second amended complaint as well as in his memorandum in opposition to summary judgment, in which he states that it is "[u]ndisputed" that Flagship told Lang in July 2012 that it "had the right under the mortgage to foreclose on Lang's personal property and had done so."

Cross in September 2019, Lang’s claims must have accrued no earlier than September 2013.

The district court reasoned that Lang “became aware in March 2012 that [Flagship] was claiming ownership of personal property that Lang believed to be his, and by July 2012, he knew [Flagship] had taken all of it.” The district court, therefore, concluded that Lang was damaged by the “allegedly illegal conduct” and had an “obligation to investigate the possibility of fraud and other potential causes of action” no later than July 2012.

Lang argues on appeal that the district court erred because it relied on the facts alleged in the second amended complaint rather than Lang’s affidavit, which was submitted in November 2019. Lang contends that his affidavit establishes a material-fact dispute because he avers that “he continued to investigate and pursue the location of his [personal] property through 2012 and 2013 and Cross concealed the sale of [Lang’s] property.” Lang argues that this shows that he could not have discovered the fraud by July 2012, as the district court concluded.

Flagship argues that our analysis should be guided by our nonprecedential decision in *Lang v. Bjorklund*, No. A21-1233, 2022 WL 2195540 (Minn. App. June 20, 2022), *rev. denied* (Minn. Sept. 20, 2022). In that case, Lang alleged that Bjorklund, director of Flagship, “conspired with other officers of the bank to defraud Lang and take his personal property.” *Bjorklund*, 2022 WL 2195540, at *1. The district court dismissed Lang’s fraud claims against Bjorklund as untimely, reasoning that Lang admitted in his complaint against Flagship that he knew of facts placing him on notice of personal-property claims in March 2012. *Id.* at *3. Lang appealed, arguing that the district court improperly

considered facts outside his amended complaint. *Id.* In affirming, this court relied on Lang's admissions in his complaint against Flagship and noted that even if the district court had erred, "it would not reverse" because Lang's subsequent "self-serving" affidavits were not sufficient to create genuine issues of material fact. *Id.* at *5-6.

We need not rely on our prior nonprecedential decision, although it is persuasive. Lang's admissions in the second amended complaint are evidence. *See Phelps*, 90 N.W.2d at 548. Lang's knowledge that Flagship was claiming possession of his personal property is shown by Lang's admissions in the second amended complaint that he knew Flagship possessed his personal property in March 2012 and that by July 2012, Flagship "had taken everything." As of that time, Lang was on notice of potential fraud claims against Moynagh and Cross relating to the personal property.

Nothing in Lang's subsequent affidavit disputes these admissions or creates a genuine issue of material fact. We note that Lang's affidavit avers that Cross informed him "in March 2012 that the Bank had the right under the mortgage to foreclose on Lang's personal property and had done so." At best, Lang's affidavit also avers that he continued to investigate the alleged fraud in 2013. In short, Lang discovered facts no later than July 2012 that put him on notice of his fraud claim against Moynagh and Cross based on Flagship's possession of his personal property. Thus, the district court did not err by determining that Lang's fraud claims against Moynagh and Cross were untimely because Lang did not commence an action within six years of when his claim accrued.

B. Unjust Enrichment

A six-year statute of limitations applies to actions seeking to recover damages based on a claim of unjust enrichment. Minn. Stat. § 541.05, subd. 1(1). A claim for unjust enrichment accrues when the plaintiff is damaged. *Block*, 428 N.W.2d at 854. To timely commence unjust-enrichment claims against Moynagh and Cross in January 2019, Lang’s claims must have accrued no earlier than January 2013. The district court determined that Lang’s unjust-enrichment claims derived from Lang’s allegation that Moynagh and Cross “retained something of value” from Flagship’s sale of Lang’s personal property, and this damage occurred in 2012. As a result, the district court determined that the statute of limitations expired before Lang commenced this action in January 2019.

On appeal, Lang argues that even though he was damaged in 2012, he “was misled” by Moynagh and Cross and could not have “learned [of the injury] in [the] next 8 months.” As discussed above, Lang admitted that he learned in July 2012 that his personal property was “taken,” yet he did not commence suit until January 2019. Any alleged fraudulent concealment by Moynagh and Cross does not save these claims because the facts triggered Lang’s duty to exercise reasonable diligence and investigate, as discussed above. Thus, the district court did not err by determining the statute of limitations expired on Lang’s unjust-enrichment claims against Moynagh and Cross.

III. The district court correctly granted summary judgment on Lang’s claims against Flagship for violating Minnesota Statutes chapter 504B, conversion of the Big Sandy personal property, and misrepresentation.

The district court granted Flagship’s motion for summary judgment on Lang’s claims that (1) Flagship violated Minn. Stat. § 504B.365 (2022) by selling his personal

property, (2) Flagship unlawfully took personal property from Big Sandy, and (3) Flagship “supplied false information to Lang” and made fraudulent or negligent misrepresentations. Each of these claims is addressed in turn.

A. Minn. Stat. § 504B.365

Lang alleged that Flagship violated statutory provisions that protected Lang as an “occupant” under Minn. Stat. § 504B.365 and that Flagship “owed [him] a duty of good faith and fair dealing in its treatment of Lang’s property.” In dismissing the claim, the district court relied on this court’s decision in *Federal Home Loan Mortgage Corp. v. Mitchell*, 862 N.W.2d 67, 73 (Minn. App. 2015) (citing Minn. Stat. § 504B.001, subd. 12 (2014)), *rev. denied* (Minn. June 30, 2015).

On appeal, Lang argues that the district court erred because Minnesota Statutes chapter 504B defines eviction as a “proceeding to remove a tenant or occupant from or otherwise recover possession of real property.” Minn. Stat. § 504B.001, subd. 4 (2022). Lang contends that he was an “occupant” of the properties, and therefore, Flagship had to comply with the duties described in Minn. Stat. § 504B.365 relating to personal property.

We need not decide whether Minn. Stat. § 504B.365 governs Flagship’s duties to Lang over his personal property that remained on the foreclosed properties. First, we note that Lang’s sole authority for relying on section 504B.365 is a nonprecedential opinion from this court, which is not binding. Minn. R. Civ. App. P. 136.01, subd. 1(c) (“Nonprecedential opinions . . . are not binding authority . . .”). Second, even if Lang is correct and the district court erred by granting summary judgment to Flagship on Lang’s section 504B.365 claim, the error did not prejudice Lang. If, on appeal, an appellant shows

that the district court erred, the mere existence of that error is, by itself, insufficient to require a grant of relief; the appellant must also show the district court's error prejudiced the appellant. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *see also* *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (citing this aspect of Minn. R. Civ. P. 61). Here, the damages Lang pursued via his section 504B.365 claim were the same as those he pursued via his conversion claim. It is true that section 504B.365, subdivisions 3(f) and 5, allow for the recovery of damages based on the failure to exercise care in the removal and storage of personal property, along with penalties. But Lang's theory is that Flagship sold his personal property for less than its actual value, not that Flagship lost or damaged the property. Thus, any error in the district court's decision to grant summary judgment on Lang's section 504B.365 claim was harmless because Lang pursued the same damages through his conversion claim, which was submitted to the jury.

B. Big Sandy Personal Property

Following Flagship's October 2010 foreclosure, Lang redeemed Big Sandy. Lang alleged that Flagship wrongly obtained around \$300,000 worth of personal property from Big Sandy during the one-year redemption period.

The district court dismissed all claims against Flagship related to personal property at Big Sandy because "Lang has produced no more than speculation and innuendo to support his claims of conversion and civil theft as to personal property located at" Big Sandy. On appeal, Lang argues that the district court erred by dismissing these claims because his testimony and affidavit asserting that personal property was taken from Big Sandy created a genuine issue of material fact. Flagship argues that the district court did

not err because “Lang cited no specific fact, no document, no exhibit, and no deposition . . . to support his repetition of his pleading’s ‘mere averments.’”

“To defeat summary judgment, the nonmoving party must do more than merely create a metaphysical doubt as to a factual issue or rest on mere averments.” *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352, 359 (Minn. App. 2016) (quotation omitted). Instead, the nonmoving party must produce “substantial evidence” to support the essential elements of its cause of action. *Id.* (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60,70-71 (Minn. 1997)). “Speculation and innuendo” are insufficient. *Id.*; accord *Johnson v. Van Blaricom*, 480 N.W.2d 138, 140 (Minn. App. 1992).

Here, the district court correctly determined that Lang failed to produce evidence in support of his claims of conversion and theft of personal property from Big Sandy. At most, Lang produced evidence that some personal property was missing after he redeemed Big Sandy. Because Lang failed to produce evidence to establish a genuine issue of material fact relating to Flagship and Lang’s personal property from Big Sandy, the district court did not err by granting summary judgment.

C. Fraudulent/Negligent Misrepresentation

Lang argues that the district court erred by dismissing sua sponte his sixth and seventh claims against Flagship, for fraudulent and negligent misrepresentation as to Lang’s personal property. Lang contends that Flagship did not move for summary judgment on these counts and that the district court failed to give adequate notice of its decision to dismiss. Flagship argues that the claims were not dismissed sua sponte because

Flagship moved for dismissal on “all of [Lang’s] claims against them with prejudice and on the merits.”

The district court dismissed the fraudulent- and negligent-misrepresentation claims for failure to plead the claims with particularity under Minn. R. Civ. P. 9.02. The district court had earlier dismissed as untimely Lang’s claims relating to real property. Count six alleged that Flagship had “special undisclosed arrangements” with Eliot relating to a \$65,000 increase in Lang’s line of credit and the mortgage on the Pope County property. Because Lang made no “specific allegations of negligent misrepresentations as to Lang’s surviving personal property claims,” the district court granted summary judgment on count six. Count seven alleged that all defendants made false representations about Lang’s loans and lines of credit. Because Lang did not allege specific intentional misrepresentations about Lang’s surviving personal-property claims, the district court granted summary judgment on count seven.

While Flagship’s motion and memorandum in support of summary judgment did not specifically ask to dismiss counts six and seven, its motion for summary judgment sought dismissal of “all claims.” The district court, therefore, did not dismiss the claims sua sponte. Even if we assume a lack of notice to Lang, he fails to persuade us that he was prejudiced by any error. *See Fed. Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251, 255 (Minn. App. 1988) (stating that “[u]nless an objecting party can show prejudice from lack of notice,” the district court’s sua sponte grant of summary judgment “should not be disturbed”), *rev. denied* (Minn. Oct. 26, 1988). Lang failed to plead either fraud claim with the required specificity because he identified no misrepresentation involving Lang’s

personal property. *See, e.g., Berke v. Resol. Tr. Corp. ex rel. Midwest Sav. Ass'n*, 483 N.W.2d 712, 717 n.3 (Minn. App. 1992) (stating that “[f]ailure to particularly plead fraud justifies summary judgment against the party alleging it”), *rev. denied* (Minn. May 21, 1992). The district court did not err by dismissing Lang’s claims against Flagship for fraudulent or negligent misrepresentation.

IV. The district court correctly granted judgment as a matter of law for Flagship on Lang’s claims for breach of contract and tortious interference.

Appellate courts “review de novo a district court’s decision to [decide] a motion for judgment as a matter of law, applying the same standard used by the district court and viewing the evidence in the light most favorable to [the nonmoving party].” *Christie v. Est. of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018) (quotation omitted); *see also Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 54-55 (Minn. 2019) (“On review of the grant of a motion for judgment as a matter of law, we make an independent determination of the sufficiency of the evidence.” (quotation omitted)). “If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court . . . may grant a motion for judgment as a matter of law against that party.” Minn. R. Civ. P. 50.01(a).

Following trial, Flagship moved for, and the district court granted, judgment as a matter of law on Lang’s claims for (1) breach of contract and (2) tortious interference with prospective economic opportunity. We discuss each claim in turn.

A. Breach of Contract

The contract claim at trial was limited to Lang's personal property at Little Pine and Flagship's alleged failure to give notice to Lang of the sale of personal property as required under the Little Pine mortgage. But the mortgage extinguished when Lang failed to redeem Little Pine in October 2011 and Flagship became the owner in fee. *See generally State v. Zacher*, 504 N.W.2d 468, 469 (Minn. 1993) (stating a property is subject to mortgage "until the redemption period expires"). And Lang alleged in the second amended complaint that Flagship took Little Pine, along with his personal property, in 2012 when he was locked out and the personal property was "taken." The district court correctly determined that Lang "cannot maintain an action for breach of contract upon based [the Little Pine] mortgage for action undertaken by [Flagship] the following year."

Lang argues on appeal that his "loan is secured and cross-collateralized" to include related documents, including other "mortgages," and the sale of the Little Pine personal property was "based on the security interest under the [other] mortgages." We are not persuaded. It is accurate that Lang pursued a breach-of-contract claim under the Pope County mortgage, which did not extinguish until April 2012. But the Pope County mortgage was limited by its terms to the real and personal property on the Pope County property. The Little Pine mortgage extinguished before Flagship's sale of Lang's personal property, and the Pope County mortgage was not "secured" by the Little Pine property.

B. Tortious Interference

Lang argues the district court erred by dismissing the tortious-interference claim. Lang argued at trial that he planned to develop the Pope County property and make

“millions” and that Flagship was liable when he failed to do so. To succeed on a tortious-interference claim, Lang needed to prove

- (1) The existence of a reasonable expectation of economic advantage;
- (2) Defendant’s knowledge of that expectation of economic advantage;
- (3) That defendant intentionally interfered with plaintiff’s reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation;
- (4) That in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and
- (5) That plaintiff sustained damages[.]

Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc., 844 N.W.2d 210, 219 (Minn. 2014). The district court determined that Lang failed to introduce “any evidence at trial to satisfy either the second or fourth of the *Gieseke* factors.”

Because Lang’s claim fails on the fourth factor, we begin there. Lang introduced no evidence that it was reasonably probable that Lang would have developed the Pope County property absent Flagship’s alleged wrongdoing. The district court relied on trial evidence that Lang defaulted on his mortgages for several properties, including Pope County and Little Pine. Lang produced no evidence that he had the funds to redeem the Pope County property in April 2012. Also, Lang stated in the second amended complaint that he could not pursue the legal claims before 2019 because he lacked the means to litigate. Thus, the district court did not err by entering judgment as a matter of law on Lang’s tortious-interference claim because Lang failed to satisfy the fourth *Gieseke* factor. Thus, we need not consider the other factors.

V. The district court correctly denied Lang’s posttrial motion on damages.

Lang challenges the district court’s denial of his posttrial motion on damages after the jury awarded him \$7,784.50 for conversion of his personal property. A reviewing court should not set aside a jury verdict on damages “unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted).

Lang argues that “[t]he jury award cannot be sustained on any reasonable” basis because the record evidence and Lang’s expert testimony established that Lang had “142 items having a fair market value in 2012 of \$1,818,862.” Lang, however, introduced no evidence establishing ownership of the many items that he testified to having at Little Pine. Lang’s experts, who testified about the value of the items, admitted that they did not see the actual items or photographs of the items and instead relied on Lang’s descriptions of the items. “[T]he jury, who see[s] and hear[s] the witnesses, [is] to determine their credibility and the weight to be given to their testimony.” *Pellowski v. Pellowski*, 265 N.W. 440, 441 (Minn. 1936). We conclude that the district court did not abuse its discretion by denying Lang’s posttrial motion on damages.

VI. Lang’s Motion to Strike

After Eliot submitted their brief to this court, Lang moved to strike it, arguing that Eliot’s brief asserted facts that were not included in the second amended complaint. After reviewing Eliot’s brief and the record, we conclude that Eliot’s brief fairly refers to the second amended complaint. *See Consumers’ Grain Co. v. Wm. Lindeke Roller Mills*, 190 N.W. 65, 65 (Minn. 1922) (stating allegations of a complaint are to be “construed, not

from a detached sentence or paragraph thereof, but from the pleading as a whole”). Thus, we deny the motion to strike.

Affirmed; motion denied.