DA 18-0595

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 138N

DENNIS THORNTON and DONNA THORNTON,

Plaintiffs and Appellants,

v.

WHITEFISH CREDIT UNION,

Defendant and Appellee.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-18-336D
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael R. Klinkhammer, Klinkhammer Law Offices, Kalispell, Montana

For Appellee:

Sean S. Frampton, Frampton Purdy Law Firm, Whitefish, Montana

Submitted on Briefs: April 10, 2019

Decided: June 11, 2019

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Dennis and Donna Thornton appeal from an order of the Eleventh Judicial District Court, Flathead County, denying their motion to file an amended complaint and granting Whitefish Credit Union's motion for summary judgment. We affirm.

¶3 In 2009, Thorco, Inc. (Thorco), an entity owned and controlled by Dennis and Donna Thornton, borrowed $3.3 million from Whitefish Credit Union (WCU) to subdivide and develop real property in Somers, Montana. Thorco pledged real property as collateral and the Thorntons personally guaranteed the loan. Thorco did not apply for a preliminary plat, never completed the development, and did not pay back the loan at maturity.

¶4 In 2012, WCU commenced a foreclosure action against Thorco and the Thorntons. The action involved two tracts of land, a 300-acre tract and a 200-acre tract (the Property). Foreclosure was entered in favor of WCU and against Thorco and the Thorntons with the total indebtedness due and owing equal to $4,348,880.01. The court

ordered the Property to be sold.[1] However, in 2016, the foreclosure action settled at mediation and the parties executed a settlement agreement and mutual release (Settlement Agreement). Under the Settlement Agreement, WCU agreed to pay Thorco[2] $150,000, the parties stipulated to vacate the foreclosure action with prejudice, and Thorco received an option to purchase the Property for the reduced price of $1.4 million if they exercised the option within eighteen months of execution of the Settlement Agreement. In June 2016, WCU tendered the $150,000 settlement payment. Thorco did not exercise its option to purchase the Property.

¶5 In April 2018, the Thorntons filed suit against WCU alleging that, pursuant to the Settlement Agreement, WCU failed to fulfill its obligation to open an escrow and place mortgage releases signed by WCU and Warranty Deeds and Realty Transfer Certificates signed by the Thorntons into the escrow. The Thorntons asserted that WCU should have recorded the mortgage releases and WCU's failure to do so prevented the Thorntons from exercising the option. The Thorntons argued that by failing to open the escrow, WCU clouded the title to the remaining real property owned by the Thorntons, preventing them from securing financial assistance. According to the Thorntons, WCU also falsely represented to potential lenders that the Thorntons and/or Thorco owed more than the agreed purchase option price. The Thorntons' claims against WCU include breach of contract, breach of the covenant of good faith and fair dealing, and allegations that WCU

[1] Thorco appealed from the judgment and order of sale and WCU moved to dismiss the appeal. This Court granted WCU's motion to dismiss.

[2] In the Settlement Agreement Thorco and Dennis and Donna Thornton were collectively referred to as "Thorco."

committed actual fraud and actual malice. The Thorntons seek actual and compensatory damages in the amount of approximately $80 million, in addition to punitive damages and attorney's fees and costs. Alternatively, the Thorntons seek specific performance requiring WCU to open the escrow and extend the window to exercise the purchase option.

¶6 On July 24, 2018, WCU filed a motion for summary judgment. The District Court granted WCU's motion, finding that each of the Thorntons' claims failed as a matter of law. The Thorntons appeal.

¶7 This Court reviews summary judgment rulings de novo for conformance to M. R. Civ. P. 56. *Davis v. Westphal*, 2017 MT 276, ¶ 9, 389 Mont. 251, 405 P.3d 73. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Davis*, ¶ 9. "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citation omitted). The party moving for summary judgment bears the initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Roe*, ¶ 14 (citation omitted). If the moving party meets this burden, then the "burden . . . shifts to the nonmoving party to establish that a genuine issue of material fact does exist." *Roe*, ¶ 14 (citation omitted). All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *Dick*

Anderson Constr., Inc. v. Monroe Prop. Co., 2011 MT 138, ¶ 16, 361 Mont. 30, 255 P.3d 1257.

¶8 When interpreting a contract, this Court's role is to construe the instrument according to its terms and neither insert nor omit terms to the contract. *Sayegusa v. Rogers*, 256 Mont. 269, 271, 846 P.2d 1005, 1006 (1993). "In situations in which the terms of the contract are clear and unambiguous, it is the duty of the court to enforce the contract as the parties intended." *Sayegusa*, 256 Mont. at 271, 846 P.2d at 1006. The Settlement Agreement language is unambiguous—Thorco had eighteen months, from the date of execution of the Settlement Agreement, to purchase one or both tracts of the Property and, if Thorco exercised the option, the appropriate mortgage releases were to be recorded and deposited into escrow. As noted by the District Court, Thorco's timely exercise of the purchase option was a condition precedent to the recording of the mortgage releases. "A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed." Section 28-1-403, MCA. It is undisputed that Thorco failed to exercise the purchase option within the specified period. Therefore, as a matter of law, no obligation accrued for either party to ensure the recording of the mortgage release or to open an escrow before the option period expired. The court correctly noted: "The original mortgage is securing an unpaid debt and its recording is authorized by law. If the Thorntons wanted the mortgage releases recorded prior to performance of the condition precedent, they could have (and must have) included language to that effect in the Settlement Agreement." The District Court correctly interpreted the Settlement Agreement.

¶9 The Thorntons' claim that WCU's actions clouded the title is similarly unpersuasive. A cloud on title impairs the ability to sell the property to others. *West v. Club at Spanish Peaks LLC*, 2008 MT 183, ¶ 59, 343 Mont. 434, 186 P.3d 1228. The Thorntons assert that WCU's failure to open the escrow and record the mortgage releases resulted in a cloud on the title because prospective buyers were unaware that the original mortgage would no longer be in effect once the option was exercised. Again, this Court is bound by the unambiguous terms of the Settlement Agreement, which clearly state that an escrow was not to be opened and the mortgage releases were not to be recorded until after the Thorntons timely exercised the purchase option. It is undisputed that the Thorntons did not exercise the purchase option. Thus, until the option was exercised, the original mortgage accurately reflected what the Thorntons owed and cannot be considered a cloud on the title.

¶10 The Thorntons further assert that the District Court improperly disregarded affidavits and exhibits which, they argue, establish genuine issues of material fact. The Thorntons argue the documents demonstrate that WCU misrepresented to potential lenders that the loan was in default and remained owing. The court disregarded the affidavits finding they were either inadmissible or immaterial. It is undisputed that the Thorntons failed to repay the loan at maturity and the original loan amount remained due and owing until the Thorntons exercised the purchase option. The affidavits and exhibits cannot prove otherwise and therefore do not establish a genuine issue of material fact.

¶11 The Thorntons alternatively contend that the District Court erred in granting summary judgment prior to the completion of discovery. However, Rule 56 provides that

"a party may move for summary judgment at any time." M. R. Civ. P. 56(c)(1)(A). Further, the Thorntons did not move for additional time pursuant to Rule 56(f), nor did they raise this argument below. M. R. Civ. P. 56(f); *Mt. W. Bank, N.A. v. Glacier Kitchens, Inc*., 2012 MT 132, ¶ 13, 365 Mont. 276, 281 P.3d 600 (declining to address an issue raised for the first time on appeal). Accordingly, the District Court did not err in granting WCU's motion for summary judgment before the completion of discovery.

¶12 The Thorntons also challenge the District Court's denial of their request to file an amended complaint. This Court reviews a district court's decision regarding a motion to amend a complaint for abuse of discretion. *Hickey v. Baker Sch. Dist. No. 12*, 2002 MT 322, ¶ 12, 313 Mont. 162, 60 P.3d 966. In August 2018, the court issued a scheduling order providing a September 14, 2018 deadline to amend pleadings and join parties. On September 14, 2018, the Thorntons filed an amended complaint but failed to move for the court's leave as required by M. R. Civ. P. 15(a)(2). The District Court struck the amended complaint for failure to comply with the Montana Rules of Civil Procedure and, considering WCU's motion for summary judgment had already been filed, extraordinary circumstances did not exist to allow the amendment. *Schumacker v. Meridian Oil Co*., 1998 MT 79, ¶ 26, 288 Mont. 217, 956 P.2d 1370 (holding that litigants will be allowed to change legal theories after a motion for summary judgment has been filed only in extraordinary cases). The Thorntons failed to present the District Court with extraordinary circumstances entitling them to a change in legal theory. Additionally, the claims they wish to include in the amended complaint are simply derivative of those

already included, and were claims that the Thorntons were aware of, or should have been aware of, when they filed their original complaint. The court did not abuse its discretion.

¶13 Finally, the Thorntons' claim of "actual malice" as set forth in § 27-1-221(2), MCA, fails as a matter of law because actual malice is not an independent cause of action. Rather, § 27-1-221(2), MCA, provides that before punitive damages may be imposed actual fraud or actual malice must be established. As noted by the District Court, "[c]ontract claims do not provide an avenue for punitive damages." *Masters Group Intl., Inc. v. Comerica Bank,* 2015 MT 192, ¶ 77, 380 Mont. 1, 352 P.3d 1101; § 27-1-220, MCA.[3]

¶14 No issues of material fact preclude summary judgment and, based on the undisputed material facts, WCU is entitled to judgment as a matter of law.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶16 Affirmed.

/S/ MIKE McGRATH

[3] The Thorntons add that they are entitled to relief from forfeiture per § 28-1-104, MCA, and § 71-1-212, MCA, "required the filing of the mortgage releases upon the Thorntons' request." They did not raise these arguments before the District Court and we therefore decline to address them for the first time on appeal. *Mt. W. Bank, N.A.*, ¶ 13.

We Concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON