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(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
NEIGHBORS CONSTRUCTION CO., INC., Appellant,
v.
WOODLAND PARK AT SOLDIER CREEK, LLC, et al., Defendants,
(Wells Fargo; Board of County Commissioners of Shawnee County, Kansas; and Kansas Housing Resources Corp.), Appellees.

No. 109,980.
May 2, 2014.

Appeal from Shawnee District Court; Larry D. Hendricks, Judge.
Vincent F. O'Flaherty, of Law Offices of Vincent F. O'Flaherty, Attorney, LLC, of Kansas City, Missouri, for appellant.

Michael E. Brown and Eric J. Aufdengarten, of Kutak Rock LLP, from Kansas City, Missouri, for appellee Welts Fargo Bank, National Association.

Before HILL, P.J., SCHROEDER, J., and HEBERT, S.J.

MEMORANDUM OPINION
PER CURIAM.

***1** Contracts should be read and understood before they are signed. A construction company that built a multifamily housing project in Topeka sued the developer of the project for nonpayment and received a $1 million judgment. At the same time, in different litigation, the bank foreclosed its mortgage on the project real estate. The district court ruled that the bank's lien was superior to the construction company's judgment lien. Because the construction company here had signed a consent agreement subordinating any potential lien it might acquire to the lien of the bank, we affirm the grant of summary judgment to the bank.

The lender and the construction company sue the developer.

Woodland Park at Soldier Creek, LLC wanted to build a multifamily housing project in Topeka, Kansas. The Kansas Development Finance Authority agreed to help finance the project. The Authority agreed to lend Woodland Park $15,715,000. In turn, Woodland Park signed a promissory note agreeing to repay to the Authority that amount plus interest. The Authority then assigned the note and mortgage to Wells Fargo Bank, National Association, as trustee of the documents.

After that, Woodland Park contracted with **Neighbors Construction** Co., Inc. to build the housing project for $16,611,466. Roger Neighbors, as representative for the company, also signed a Consent and Agreement of Contractor at the same time. Language in the Consent Agreement confirmed Neighbors was also acknowledging and consenting to an "Assignment of Construction Agreement" made in connection with the project. This language made the mortgage lien superior to any lien Neighbors might obtain and agreed that its lien would be subordinate.

Neighbors proceeded with its work and furnished labor, material, equipment, and supplies in its construction of the Woodland Park housing project. Near

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the end of the work, in May 2011, Woodland Park owed Neighbors over $1,227,000. Neighbors then filed two mechanic's liens against Woodland Park and ultimately obtained a judgment for $1,277,701.31 against Woodland Park. That judgment was affirmed by this court on appeal. ***Neighbors Construction*** *Co. v. Woodland Park at Soldier Creek,* 48 Kan.App.2d 33, 284 P.3d 1057 (2012).

Meanwhile, in a different action, Wells Fargo sought to foreclose its mortgage and establish the priority of any liens on the property by court order. Neighbors—as a lienholder named in the action—answered Wells Fargo's petition and asserted six counterclaims against it. The district court consolidated all of Neighbors' claims under Case 09C1202, except the foreclosure and the priority of lien issues.

In the consolidated case, Neighbors argued that under the terms of the mortgage agreement between Wells Fargo and Woodland Park, Wells Fargo had actually promised to pay any unpaid lienholders in the event of a default by Woodland Park. Neighbors claimed Wells Fargo had entered a contract to pay the liens of all persons who supplied labor and materials in connection with the housing project. Neighbors also made claims of unjust enrichment and promissory estoppel.

***2** Unmoved by these arguments, the district court granted Wells Fargo's motion to dismiss Neighbors' third-party beneficiary claim. The court also granted Wells Fargo's motion for summary judgment on Neighbors' remaining claims—breach of contract, unjust enrichment, and promissory estoppel.

Neighbors appeals these rulings, and we will focus on the three in that order.

How we deal with these questions.

The law of summary judgments is well settled:

> " 'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. [Appellate courts] apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.' [Citation omitted.]

"To the extent there is no factual dispute, appellate review of an order granting summary judgment is unlimited. [Citation omitted.]" *Carrothers Constr. Co. v. City of South Hutchinson,* 288 Kan. 743, 750–51, 207 P.3d 231 (2009).

Here, the district court based its ruling on its interpretation of the various contracts of the parties. Issues involving the interpretation and legal effect of a written contract involve questions of law subject to unlimited review by this court without deference to the district court's interpretations. *Shamberg, Johnson & Bergman, Chtd. v. Oliver,* 289 Kan. 891, 900, 220 P.3d 333 (2009). In interpreting written contracts, the primary rule is to ascertain the parties' intent. If the contract terms are clear, the intent of the parties must be determined from the contract language without applying rules of construction. Interpreting a contract that is free from ambiguity is a judicial function that does not require oral testimony to determine the contract's meaning. A contract is not ambiguous unless two or more meanings can be construed from the

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contract provisions. *Carrothers*, 288 Kan. at 751. In interpreting contracts, courts cannot isolate one particular sentence or provision but instead must construe and consider the entire contract in harmony where possible. *City of Arkansas City v. Bruton*, 284 Kan. 815, 832–33, 166 P.3d 992 (2007).

We first examine the breach of contract claim.

Neighbors argues that the language in the Collateral Agreement, the Consent Agreement, and the Mortgage Agreement demonstrates that Wells Fargo intended to pay Neighbors in the event of a default by Woodland Park. Neighbors says the district court erred in granting summary judgment on its breach of contract claim because there is a question of fact about whether Welts Fargo indeed agreed to pay Neighbors for its unpaid labor, materials, and improvements if Woodland Park defaulted after the housing project was substantially complete.

***3** The legal rules concerning this claim are straightforward. To demonstrate a breach of contract claim, a party must show:

(1) a contract existed between the parties;

(2) there was sufficient consideration to support the contract;

(3) one party performed or was willing to perform the requirements of the contract;

(4) a party breached the contract; and

(5) there were damages to the plaintiff caused by the breach of the contract.

Commercial Credit Corporation v. Harris, 212 Kan. 310, Syl. ¶ 2, 510 P.2d 1322 (1973); *City of Andover v. Southwestern Bell Telephone*, 37 Kan.App.2d 358, 362, 153 P.3d 561 (2007).

Our first observation in this case is that Neighbors has not shown us that a contract between it and Wells Fargo existed. This is the first element required to prove a breach of contract claim. Indeed, as a substitute, Neighbors relies on language in the agreements between Neighbors and Woodland Park and the agreements between Woodland Park and Wells Fargo, but it fails to point to any agreement *between Neighbors and Wells Fargo.* As the district court pointed out, Neighbors was not a party to the Mortgage Agreement, Wells Fargo was not a party to the Construction Contract, and Neighbors was not a party to the Collateral Assignment—yet these are the contracts Neighbors relies upon to support its breach of contract claim. In the absence of a contract between Neighbors and Wells Fargo, Neighbors has simply failed to show the district court erred in denying a breach of contract claim.

Trying to create something from nothing, Neighbors contends that Wells Fargo somehow agreed to satisfy any unpaid mechanic's liens and cites Sections 4 and 5 of the Collateral Assignment as support for this contention. There is no help for Neighbors in those two sections. In Section 4, Woodland Park and Wells Fargo agreed that if Woodland Park failed to perform any covenants contained in the construction documents, Wells Fargo *could* perform such covenants "*without obligation to do so*" (Emphasis added.) The parties to that contract agreed that any costs incurred by Wells Fargo in doing so would be added to Woodland Park's indebtedness.

Then, in Section 5 of the Collateral Assignment, Woodland Park and Wells Fargo acknowledged that although Wells Fargo was "not [ ] obligated" to perform any of Woodland Park's obligations under the construction documents, Wells Fargo could add any liability or loss it incurred in doing so to Woodland Park's indebtedness. Neighbors' reliance on Sections 4 and 5 is clearly misplaced, for this language merely

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records that Wells Fargo had the *option* to pay these items, *if it chose to do so.*

Going further, we note that there is a covenant in the Mortgage Agreement that mentions the priority of liens. Section 2.06 provides that Woodland Park will endeavor to preserve the mortgage as a first lien on the property:

> "Mortgagor [Woodland Park] will maintain this Mortgage as a valid first lien on the Mortgaged Property, and Mortgagor will not, directly or indirectly, create or suffer or permit to be created, or to stand against the Mortgaged Property ... and will promptly discharge, any lien or charge whatsoever other than the Permitted Encumbrances, whether prior to, upon a parity with or junior to the lien of the Mortgage; provided, however, that nothing herein contained shall require Mortgagor to pay or cause to be paid any Imposition prior to the time the same shall become Due and Payable. *Mortgagor will keep and maintain the Mortgaged Property, and every part thereof, free from all liens of persons supplying labor and materials in connection with the construction, alteration, repair, improvement or replacement* of the Improvements, the Equipment or the Furnishings. If any such liens shall be filed against the Mortgaged Property, or any part thereof, Mortgagor shall immediately release or discharge the same of record, by payment, bonding or otherwise, or otherwise provide security satisfactory to Mortgagee [Wells Fargo] in Mortgagee's sole discretion, within 15 days after the filing thereof. *In the event that Mortgagor fails to make payment of or bond such liens, Mortgagee shall make payment thereof,* and any amounts paid as a result thereof, together with interest ..., shall be immediately Due and Payable by Mortgagor to Mortgagee and, until paid, shall be added to and become a part of the Indebtedness and shall have the benefit of the lien hereby created as a part of the Indebtedness and shall have the benefit of the lien hereby created as a part thereof prior to any right, title or interest in or claim upon the Mortgaged Property attaching or accruing subsequent to the lien of this Mortgage...." (Emphasis added.)

***4** Again, this language memorializes Wells Fargo's discretion to pay these items, if it chose to do so, in an agreement with Woodland Park, not Neighbors.

Finally on this point, in other parts of the mortgage we find farther wording that indicates Wells Fargo was not obligated to pay Neighbors. Section 7.03 of the Mortgage Agreement provides that if Woodland Park fails to make payment to Wells Fargo in accordance with the note, Wells Fargo has "the right, but not the obligation," to make payment or take appropriate action to perform covenants or obligations on behalf of Woodland Park in order to protect its security interest.

The most convincing language that controls our ruling is the Consent Agreement. The Consent Agreement provides:

> "FOR VALUE RECEIVED, the undersigned, each of whom has, pursuant to one or more of the Construction Documents described in the above Assignment of Construction Agreement (the 'Assignment'), performed or supplied, or agreed to perform or supply, certain services, materials and/or other items in connection with the construction of the Improvements referred to in the Assignment (each of the undersigned being hereinafter severally referred to as the 'Undersigned'), hereby acknowledge and consent to the Assignment. Each of the Undersigned does hereby warrant and represent that no default exists under the terms of any agreement between Borrower and the Undersigned relating to the real property described in Exhibit A of the Assignment (the 'Property'). Each of the Undersigned does hereby agree that (a) in the event

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of any default by Borrower under the terms of the Bond Documents described in the Assignment, Trustee at its option shall be entitled to use, without further payment or charge of any kind, any and all plans, specifications, drawings, surveys or other documents, as the case may be, prepared or owned by the Undersigned relating to the construction of the Improvements contemplated by said Bond Documents, and that (b) in the event of any default by Borrower under the terms of said Bond Documents, the Undersigned shall, upon receipt of written notice and demand of Trustee, continue performance on behalf of Trustee, provided that the Undersigned (i) is reimbursed for such performance on behalf of Trustee in accordance with its agreement for the performing or supplying of such services, materials and/or other items and (ii) has been compensated for all past performance in accordance with such agreement, and that (c) in the event of any default by Borrower under the terms of any agreement between Borrower and the Undersigned relating to the Property, then the Undersigned shall deliver to Trustee at the address for Trustee set forth in the Assignment, by certified United States mail, postage prepaid, return receipt requested, written notice of such default and the action required to cure the same, and Trustee shall have a reasonable time (but in no event less than 30 business days after receipt of such notice) within which Trustee shall have the right, but not the obligation, to cure such default, and the delivery of such notice of default of the failure of Trustee to cure the same within the time allowed, as aforesaid, shall be conditions precedent to the exercise of any right or remedy of the Undersigned arising by reason of such default, and that (d) the Undersigned shall not enter into any modification or amendment of any agreement with a monetary effect exceeding $10,000 with Borrower regarding the Property and Improvements without providing not less than 10 days' written notice thereof to Trustee, or such shorter time period as necessary to avoid a default under any such agreement, and that (e) the lien of Trustee's Mortgage and other Bond Documents, whether now or hereafter recorded, shall be superior to any claims of the Undersigned, and the Undersigned does hereby subordinate any lien or claim which the Undersigned might now have or hereafter acquire upon the Property and Improvements to the lien of Trustee's Mortgage and Bond Documents.

***5** "The Undersigned represents that it is looking to Borrower, and not to Trustee, for payment under the Construction Documents, except as provided in clause (b) of the preceding paragraph, and the Undersigned waives any equitable lien which the Undersigned may now or hereafter have upon the proceeds of the Bonds."

This language makes it clear that Wells Fargo made no promise to pay the liens of contractors like Neighbors. Instead, the Consent Agreement provides that in the event of a default by Woodland Park, Wells Fargo is only obligated to reimburse Neighbors for its performance (and compensate it for past performance) *if* Wells Fargo gives Neighbors written notice and demand for such performance.

But the district court found that Wells Fargo made no such demand upon Neighbors after Woodland Park's default. Neighbors essentially concedes Wells Fargo did not demand its performance, but instead Neighbors argues it was unnecessary for Wells Fargo to make a formal demand because continued performance was not required here because construction was "substantially complete" at the time of Woodland Park's default. In Neighbors' view it was "futile" for Wells Fargo to demand performance by Neighbors. Neighbors contends that in these circumstances, Wells Fargo was obligated to pay it even though Wells Fargo did not demand its performance.

We are not convinced by this argument for two reasons. First, by signing the Consent Agreement, Neighbors agreed to its terms. The Consent Agree-

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ment makes no mention of a default after substantial completion of the housing project. If Neighbors wanted the Consent Agreement to address this sort of situation, Neighbors should have negotiated to that end. Neighbors cannot now complain about the terms of the contract it entered into freely. Kansas courts consistently recognize that contracts should be enforced according to their terms. *Hall v. Shelter Mutual Ins. Co.*, 45 Kan.App.2d 797, 800–01, 253 P.3d 377 (2011), *rev. denied* 293 Kan. 1096 (2012). It is not the business of the courts to add to or alter the terms the parties have worked out for themselves. *Investcorp v. Simpson Investment Co.*, 277 Kan. 445, 462–63, 85 P.3d 1140 (2003). Absent fraud, a bad bargain will not relieve a party from specific performance of a contract. See *Estate of Link v. Wirtz*, 7 Kan.App.2d 186, 189, 638 P.2d 985, *rev. denied* 231 Kan. 800 (1982).

Second, the facts do not support Neighbors' argument. Further performance by Neighbors was necessary in order for the job to be complete—even if that performance only amounted to smaller details. But under the terms of the Consent Agreement, Wells Fargo was only obligated to pay Neighbors for its completion of performance *if* Wells Fargo demanded Neighbors to perform—and this did not occur here. If Neighbors wanted to protect itself in the event that performance was substantially complete at the time of default, it should have negotiated different contract terms.

***6** In granting summary judgment to Wells Fargo on Neighbors' breach of contract claim, the district court first observed that Neighbors was not a party to the Mortgage Agreement. As far as Section 2.06 of the Mortgage Agreement, the court found Neighbors could not claim reliance on this section considering *Roger Neighbors admitted he did not read the Mortgage Agreement despite being given the opportunity to do so.*

The court next noted Wells Fargo was not a party to the Construction Contract and found nothing in the contract indicating an agreement between Wells Fargo and Neighbors. The court found the Collateral Assignment was an agreement between Woodland Park and Wells Fargo which assigned Woodland Park's rights, but not its obligations, to Wells Fargo. The court cited language from the Collateral Assignment indicating Wells Fargo was able to perform covenants on behalf of Woodland Park, but that it had no obligation. The court observed that Roger Neighbors signed the Consent Agreement—which provided that Wells Fargo only became obligated to Neighbors if Wells Fargo demanded performance by Neighbors. And the court found that Wells Fargo did not demand performance by Neighbors. The court concluded that where "no contract existed" between Neighbors and Wells Fargo, there could be no breach of contract claim. We find no error in any of these conclusions.

The district court did not err in granting summary judgment to Wells Fargo on this claim.

We turn to Neighbors' third-party beneficiary claim.

Neighbors argued it was a third-party beneficiary to the Mortgage Agreement between Wells Fargo and Woodland Park. The court granted Wells Fargo's motion to dismiss the claim, holding there was no evidence Neighbors was an intended beneficiary of the mortgage.

The district court found that Section 2.06 of the Mortgage Agreement was "selfishly made to secure [Wells Fargo's] interest in the property, rather than to benefit those who would levy liens against the property." The court said Wells Fargo's mere knowledge that Neighbors was the contractor for the project and that Neighbors may somehow benefit from the Mortgage Agreement was insufficient to establish that Neighbors was an intended beneficiary. Neighbors contends the district court erred in dismissing its third-party beneficiary claim because there was a "fact issue" as to whether it was an intended beneficiary of

the Mortgage Agreement.

The question whether the district court erred in granting a motion to dismiss for failure to state a claim is one of law subject to unlimited review. *Cohen v. Battaglia*, 296 Kan. 542, 545, 293 P.3d 752 (2013). When the district court has granted a motion to dismiss for failure to state a claim, this court accepts the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn from the facts. We then decide whether those facts and inferences state a claim based on the plaintiff's theory or any other possible theory. If so, we must reverse the dismissal. 296 Kan. at 546.

***7** Neighbors again relies on Section 2.06 of the Mortgage Agreement. As discussed previously, this provision provides that in the event Woodland Park fails to pay the lien of a person supplying labor and materials in connection with the construction of the housing project,

> "[Wells Fargo] shall make payment thereof, and any amounts paid as a result thereof, together with interest ..., shall be immediately Due and Payable by Mortgagor to Mortgagee and, until paid, shall be added to and become a part of the Indebtedness and shall have the benefit of the lien hereby created as a part of the Indebtedness and shall have the benefit of the lien hereby created as a part thereof prior to any right, title or interest in or claim upon the Mortgaged Property attaching or accruing subsequent to the lien of this Mortgage." (Emphasis added.)

The trouble with this argument is that nothing in this language suggests Wells Fargo intended a benefit for Neighbors.

Kansas courts recognize two types of third-party beneficiaries of a contract: intended beneficiaries and incidental beneficiaries. *Byers v. Snyder*, 44 Kan.App.2d 380, 386, 237 P.3d 1258 (2010), *rev. denied* 292 Kan. 964 (2011). Neighbors claims it is an *intended* beneficiary to the Mortgage Agreement.

Several general rules apply when determining whether a particular person or entity is an intended beneficiary of a contract. See *Fasse v. Lower Heating & Air Conditioning, Inc.*, 241 Kan. 387, 391, 736 P.2d 930 (1987); *Kincaid v. Dess*, 48 Kan.App.2d 640, 647, 298 P.3d 358, *rev. denied* 297 Kan. 1246 (2013). A qualified third-party beneficiary may enforce a contract expressly made for its benefit even though it was not a party to the transaction. But the party who claims to be a third-party beneficiary has the burden of demonstrating the existence of some provision in the contract that operates to its benefit. To carry out this burden, the party must show the contract was made for its benefit. *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 793, 107 P.3d 1219 (2005).

To be enforceable, the intent to benefit a third party must be *clearly expressed* in the contract. *State ex rel. Stovall*, 278 Kan. at 795. Mere knowledge that an intent to benefit the third party is not the same as an intent to benefit that third party. *State ex rel. Stovall*, 278 Kan. at 795; *Byers*, 44 Kan.App.2d at 387. Not everyone who may benefit from the performance or suffer from the nonperformance of a contract between other parties may enforce the contract by court action. *Fasse*, 241 Kan. at 388–89. A third party that benefits only incidentally from a contract is not an intended beneficiary that may enforce a contract. *State ex rel Stovall*, 278 Kan. at 795. If the contract is primarily for the benefit of the contracting parties, the mere fact that a third party may happen to benefit does not give that party the right to sue for a breach of the contract. *Martin v. Edwards*, 219 Kan. 466, Syl. ¶ 5, 548 P.2d 779 (1976).

***8** Our Supreme Court has advised that a contractor is not a third-party beneficiary merely because someone borrows money to pay the contractor. "The loaning of money to finance the construction of a

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building and thus pay contractors is not a third-party-beneficiary contract. While such a contract indirectly inures to the benefit of the contractors, generally there is no specific provision for their direct benefit.' " *Holiday Development Co. v. Tobin Construction Co.*, 219 Kan. 701, 708, 549 P.2d 1376 (1976) (quoting *Mortgage Associates v. Monona Shores*, 47 Wis.2d 171, 190–91, 177 N.W.2d 340 [1970]).

Section 2.06 of the Mortgage Agreement makes no reference to Neighbors. And the Mortgage Agreement expressed no intention that Neighbors or any other party in a like position receive any benefit from Wells Fargo's agreement to pay Woodland Park's liens. Instead, the Section merely expresses Wells Fargo's intention to pay any unpaid liens for *its own benefit.* The Section expresses that if Wells Fargo indeed pays Woodland Park's unpaid liens, it may add this amount to Woodland Park's total indebtedness and maintain its superior lien against the property. We agree with the district court—Section 2.06 was made to secure Wells Fargo's interest in the property rather than to benefit any of the parties who may have had liens against the property.

At best, Neighbors has shown that Wells Fargo knew Neighbors was building the housing project and that it expected to be paid from bank proceeds. But the mere knowledge that a contract will benefit a third party does not demonstrate the required intent to benefit that third party. Here, Neighbors has failed to show it was an intended third-party beneficiary of the Mortgage Agreement. In these circumstances, the district court correctly dismissed Neighbors' third-party beneficiary claim because Neighbors has no valid claim as a matter of law.

We look next at the unjust enrichment claim.

Neighbors claims that Wells Fargo had received a benefit by obtaining a completed project without having to pay Neighbors and it was " 'unjust and unconscionable' " for Wells Fargo to retain the benefit of the completed project when it knew Neighbors had not been paid for its work.

This is a review of an order granting summary judgment, and we need not repeat our standard of review at this point.

Under Kansas law, the basic elements of an unjust enrichment claim are:

> (1) a benefit conferred upon the defendant by the plaintiff;
>
> (2) an appreciation or knowledge of the benefit by the defendant; and
>
> (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *Haz–Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166, 177, 910 P.2d 839 (1996).

Neighbors has failed to show it was inequitable for Wells Fargo to accept or retain any benefit it may have received by obtaining the completed project without paying Neighbors for its work. All of the agreements involved in this project clearly reflect Wells Fargo's lack of obligation to pay Neighbors in the event of a default by Woodland Park.

***9** Neighbors had the right to review the loan documents, and it could have negotiated for better terms had it so desired. Neighbors had the right to review the loan documents and all of the financial arrangements. The court found Woodland Park asked Roger Neighbors to attend the closing of the financing for the project, and the Consent Agreement (which was signed by Neighbors and which contained the Collateral Assignment) referred to both the mortgage

and the loan agreement. The court determined that Roger Neighbors had the opportunity to read and understand the financial documents but he chose not to do so. In these circumstances, we will not grant Neighbors equitable relief just because it may have made a bad bargain. We cannot disregard the parties' agreements just because they have turned out to be disadvantageous to Neighbors. If we did so, all of the contract provisions pertaining to Wells Fargo's lack of obligation to pay other lienholders would be rendered meaningless. We will not rewrite a contract.

Neighbors cites *Security Benefit Life Ins. Corp. v. Fleming Companies, Inc.*, 21 Kan.App.2d 833, 908 P.2d 1315 (1995), for the proposition that a secured creditor is unjustly enriched when it assumes operation of a business with knowledge that a contractor was left unpaid. But the facts of that case differ from those present here. Most significantly, in *Security Benefit* the parties did not enter into contracts and agreements like those found here—which specifically state Wells Fargo had no obligation to pay liens like Neighbors'. In *Security Benefit*, this court's ruling that the plaintiff made a valid claim for unjust enrichment was based in part on our determination that the plaintiff *had*—contrary to the district court's conclusion—properly perfected its lien. See 21 Kan.App.2d at 837–42. Here, in Wells Fargo's foreclosure action against Woodland Park, the district court determined Wells Fargo's mortgage had priority over Neighbors' lien. And the propriety of that determination is not before us in this appeal.

In its brief, Neighbors emphasizes Roger Neighbors' testimony that he did not "understand" the effect of signing the Consent Agreement and he believed he had mechanic's lien rights. Neighbors argues this created a question of fact as to whether the Consent Agreement was equitable. Neighbors criticizes the district court for "improperly judg[ing]" Roger Neighbors' credibility.

In holding it was not inequitable for Wells Fargo to retain a benefit without paying Neighbors, the district court indeed emphasized Roger Neighbors' testimony that he expected to be paid by Woodland Park and his admission that he failed to read the loan documents. But the district court was not making a credibility determination when it commented on Roger's testimony. Instead, it was finding *legal* significance in Roger's undisputed testimony. The district court simply reasoned that where Roger admitted he had not read the loan documents—which clearly reflected Wells Fargo's lack of obligation to pay lienholders like Neighbors—Neighbors' claim that it is inequitable to enforce the agreements was unpersuasive.

***10** Roger's failure to read the documents cuts against the very core of Neighbors' equitable argument. As this court recognized in *Dunn v. Dunn*, 47 Kan.App.2d 619, 641, 281 P.3d 540 (2012), *rev. denied* 296 Kan. 1129 (2013), equitable remedies (there, the doctrine of equitable estoppel) are not available for the protection of those who have suffered loss solely by reason of their own acts or omissions; equity aids the vigilant and not those who slumber on their rights.

The district court correctly granted summary judgment to Wells Fargo on this claim.

We now review the promissory estoppel claim.

Once again, this is a review of a grant of summary judgment, and we will use the same test as set out previously.

To succeed with a promissory estoppel claim, a defendant must show:

> (1) that a promise was made under circumstances where the promisor intended and reasonably expected that the promise would be relied upon by the promisee;

(2) the promisee acted reasonably in relying upon the promise; and

(3) refusal to enforce the promise would sanction the perpetration of fraud or result in injustice. *Bittel v. Farm Credit Services of Cent. Kansas*, 265 Kan. 651, 661, 962 P.2d 491 (1998).

The remedy in a promissory estoppel action can be modified as justice demands and may include specific performance of a contract. *Byers*, 44 Kan.App.2d at 391.

Nothing in the record supports a finding that Wells Fargo made a promise under circumstances where it intended and expected Neighbors to rely on that promise. In fact, the record establishes the opposite.

Section 2.06 of the Mortgage Agreement contains no direct promise to Neighbors or to any other lienholder. Instead, the section merely expresses Wells Fargo's agreement with Woodland Park to pay its liens *for Wells Fargo's benefit.* The Mortgage Agreement was made with Woodland Park only, and there was no promise to any lienholders. Thus, the Mortgage Agreement was not made under circumstances where Wells Fargo would have intended and reasonably expected that a lienholder like Neighbors would rely on it.

Clearly, the Collateral Assignment specifically states that if Woodland Park fails to perform any covenant contained in the construction documents, Wells Fargo is "without obligation" to perform those covenants. The Collateral Assignment states Wells Fargo is not obligated to perform any of Woodland Park's obligations under the construction documents. The Consent Agreement provides that if Woodland Park defaults, Neighbors is only obligated to perform if Wells Fargo demands performance by Neighbors. The Consent Agreement states Wells Fargo has the "right" but not the "obligation" to cure Woodland Park's default; it confirms that Wells Fargo's mortgage is "superior" to any of Neighbors' claims; it states Neighbors will "subordinate any lien or claim" which it may have or acquire; and it confirms Neighbors is "looking to" Woodland Park and "not to [Wells Fargo]" for payment under the construction documents.

***11** Under these circumstances, Neighbors has not demonstrated that Wells Fargo made a promise to pay Neighbors under circumstances where Wells Fargo intended and reasonably expected that this promise would be relied upon by Neighbors.

Further, Neighbors has not demonstrated that it relied upon such a promise as required in *Bittel*, 265 Kan. at 661. There is no dispute that Roger Neighbors did not read the Mortgage Agreement. Yet Neighbors relies almost entirely on the language set forth in Section 2.06 of the Mortgage Agreement to support its promissory estoppel claim. How can it rely on a promise it did not read? Neighbors cannot establish it relied on a promise supposedly set forth in a document Roger Neighbors did not read.

Neighbors has not demonstrated that a failure to enforce this alleged promise by Wells Fargo would sanction the perpetration of fraud or result in an injustice. See *Bittel*, 265 Kan. at 661. All the documents involved in the transaction reflect Wells Fargo's lack of obligation to pay the liens of parties like Neighbors. Roger Neighbors admitted he did not read the Mortgage Agreement—the only document that contains language that mentioned Wells Fargo could choose to pay lienholders. In these circumstances, Neighbors has not demonstrated that a refusal to force Wells Fargo to pay Neighbors would result in an injustice to Neighbors.

The case Neighbors relies upon does not support its cause. In *Kirkpatrick v. Seneca National Bank*, 213 Kan. 61, 515 P.2d 781 (1973), there was evidence that

the bank assured the plaintiff/third party it would be paid for its work. The court held the plaintiff was entitled to payment for her services because the bank made an express promise to the plaintiff that it would make sure she got paid, and the court found the plaintiff relied on this promise when she performed her services. 213 Kan. at 67. Here, there is no evidence that Wells Fargo made any promise to Neighbors upon which it relied. *Kirkpatrick* lends no support to Neighbors' claim.

The district court did not err in dismissing Neighbors' third-party beneficiary claim.

Affirmed.

Kan.App.,2014.
Neighbors Const. Co., Inc v. Woodland Park at Soldier Creek, LLC
324 P.3d 342, 2014 WL 1796236 (Kan.App.)

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