NOT DESIGNATED FOR PUBLICATION

No. 125,204

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DOLORES ANN LANEY, AS TRUSTEE OF THE LANEY REVOCABLE TRUST, DATED FEBRUARY 15, 2017, JANICE COLEMAN, MARK K. LANEY, and MARCIA A. CARTER,
Appellees,

v.

CAROLCO SERVICE, INC.,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; RHONDA K. MASON. Opinion filed July 14, 2023. Affirmed.

Andrew L. Foulston, of McDonald Tinker PA, of Wichita, for appellant.

Mark T. Emert and *Jennifer R. Johnson*, of Fagan & Emert, LLC, of Lawrence, for appellees.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

WARNER, J.: This case concerns the title to a house in Mission. In 2000, Kenneth and Dolores Laney used the house as collateral to secure a loan from Carolco Services, Inc. The terms of the note and mortgage involved in the loan showed it was to be repaid in roughly three years. The Laneys made a few payments on the loan over the next few years, but they stopped making payments altogether in 2003. After that, no party took any action to collect repayment or otherwise enforce the note for almost two decades.

In 2019, Dolores and the other current owners of the Mission house filed this quiet-title action. The Laneys wished to sell the house and sought a judicial determination

that Carolco had no interest in the property. In 2020, Carolco filed a counterclaim to foreclose on the mortgage, noting the Laneys had failed to repay the loan from 2000. The district court granted summary judgment for the Laneys, finding Carolco's claims were filed more than a decade after the five-year limitation on contract claims in K.S.A. 60-511(1) expired. We affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2000, the Laneys requested a $118,000 loan from Carolco to consolidate some of their debts. Under the terms of the Laneys' promissory note, the Laneys agreed to repay the principal, with 8% annual interest, in monthly installments of $3,600 beginning on January 1, 2001. The note stated that if the Laneys defaulted on any of the monthly installment payments, "all the remaining installments shall become due and payable at once, and bear interest at 12% per annum."

To secure the note, the Laneys executed a mortgage on their house in Mission. The mortgage stated that if the Laneys failed to pay any of the loan principal or the interest when due, then "the whole of said sums and interest shall, at the option of [Carolco], by virtue of this Mortgage, immediately become due and payable."

The note did not specify when the loan would be satisfied. But under the terms of the loan—monthly payments of $3,600 at 8% annual interest—the note would have been paid in just over three years if all payments were made in full and on time. According to Carolco, however, the Laneys did not successfully repay the loan; Carolco asserts that the Laneys made no payments in 2001 or 2002 and stopped making payments altogether after November 2003.

In late 2002, the Laneys went to dinner at the Argosy Casino with several people, including Harold Jenkins, Carolco's president and owner, and Mike Jarvis, Carolco's

then-attorney and treasurer. After dinner, the Laneys met with Jenkins and Jarvis to discuss the loan. While all parties acknowledge that this conversation took place, they dispute its substance. Further complicating this dispute is the fact that almost all the people involved have passed away or do not recall what was discussed.

In describing the conversation, Jarvis claims that Kenneth Laney proposed that the Laneys would fully repay the loan in 2003 if Carolco promised not to foreclose on the mortgage. Under this alleged proposal, the Laneys would market and sell their home if they failed to make the payments, using the sale proceeds to pay off the note and mortgage. According to Jarvis, Jenkins agreed to these terms.

Neither this discussion, nor the proposal, nor the alleged agreement was ever memorialized in writing. Kenneth and Jenkins have both since passed away. Dolores Laney has been diagnosed with Alzheimer's disease and apparently does not remember what occurred. Jarvis has surrendered his law license but continues to act as the secretary, treasurer, and registered agent of Carolco's successor company.

The Laneys made 12 payments—totaling $43,200—in 2003, with the last payment on November 26, 2003. Carolco asserts that they made no other payments after that.

When Kenneth passed away in 2008, his interest in the house was divided between Dolores, Janice Coleman, Mark Laney, and Marcia Carter. (For ease of reference, we refer to these people as the Laneys.) In 2017, Dolores transferred her interest in the house to the Laney Revocable Trust, of which she was the trustee.

Two years later, the Laneys contracted to sell the house to a third party for $190,000. A title search revealed Carolco's December 2000 mortgage. Thus, in October 2019, the Laneys filed a petition to quiet title to the house. According to the Laneys, Carolco had no claim to the property because the Laneys' obligations under the note and

mortgage were satisfied in 2003. And the Laneys argued that any action to enforce the note or mortgage was barred by all applicable statutes of limitations under K.S.A. 60-511(1) and K.S.A. 60-1002(b).

Carolco filed a counterclaim, seeking to collect on the unpaid note and foreclose on the mortgage. Carolco asserted that the Laneys defaulted on the loan by failing to repay it and transferring title to the house to the trust without settling their debt. According to Carolco, the loan had continued to accrue interest since the Laneys' default in 2003, resulting in a total outstanding debt of almost $260,000.

The district court allowed the sale of the house to proceed, provided that the proceeds be held in escrow until the court sorted out the parties' claims. Once the sale was complete, both parties moved for summary judgment on the nature of Carolco's interest in the property.

- The Laneys asserted that Carolco's efforts to enforce its note and foreclose on the mortgage were barred by K.S.A. 60-511(1), which states that claims involving written contracts must be brought within five years. Carolco responded that the Laneys should be estopped from asserting the statute of limitations as a defense, as the Laneys' promise to sell the house to pay the mortgage induced Carolco's inaction.

- Carolco asserted that the Laneys' quiet-title request was untimely and questioned their ownership of the house (or the proceeds from the sale of the house). The company also asserted that Dolores owed about $260,000 in principal and interest. Finally, it questioned Dolores' mental capacity to sue (because her children have indicated that she has dementia) and asked the court to appoint someone to speak for her as the case progressed.

After considering the parties' competing motions—which consisted of hundreds of pages of argument and attachments—the district court found that the statute of limitations barred Carolco's counterclaim to enforce the note and foreclose on the mortgage, as more than five years had passed since the Laneys defaulted on the loan. The court thus granted the Laneys' motion for summary judgment and denied Carolco's motion for partial summary judgment. Carolco appeals.

DISCUSSION

Carolco's primary argument on appeal is that the district court erred when it found Carolco's efforts to collect on the note and enforce the mortgage were barred by the statute of limitations for written contracts. Carolco challenges this conclusion from several angles, ranging from the date of the default to the impact of the parties' 2002 conversation at the casino regarding the modification of the loan. Carolco also asserts that the district court lacked authority to consider any of the claims before it without first assessing Dolores Laney's capacity to file this lawsuit.

The district court's decision resulted from the parties' competing motions for summary judgment. Summary judgment—that is, judgment without a trial—is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations 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." K.S.A. 2022 Supp. 60-256(c)(2). Summary judgment should be granted when the moving party shows there is nothing a fact-finder could decide that would change the outcome of the case. *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). When material facts are disputed, leaving a genuine question for the fact-finder to resolve, summary judgment should be denied. 289 Kan. at 900.

In ruling on a summary-judgment motion, a district court views the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference drawn from the evidentiary record. 289 Kan. at 900. If reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. *Becker v. The Bar Plan Mutual Insurance Company*, 308 Kan. 1307, 1311, 429 P.3d 212 (2018); *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

On appeal, this court applies the same framework as the district court, exercising de novo review. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). To the extent that this analysis requires examining, interpreting, and assimilating Kansas statutes or involves our jurisdiction, our review is also unlimited. See *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019); *Graham v. Herring*, 297 Kan. 847, 855, 305 P.3d 585 (2013). Through this lens, we examine the parties' arguments.

1. *The district court did not err when it denied Carolco's request for a ruling on Dolores Laney's capacity to maintain this lawsuit.*

We first consider Carolco's threshold assertion on appeal that the district court had no authority to rule on the parties' summary-judgment motions without first evaluating Dolores Laney's ability to participate in the lawsuit given her diminished mental capacity. This discussion requires some additional factual background.

As the parties exchanged discovery in this case, it came to light that Dolores has suffered from Alzheimer's disease since 2016 or 2017. The record does not reflect that Dolores has ever been found incompetent or incapacitated. But Paula McQueen, Dolores' daughter, testified that Dolores does not recall things about her past, "speaks gibberish," and "tells stories that are just kind of delusional." Dolores granted a durable power of attorney to McQueen in 2017, about the same time Dolores transferred ownership of the

house to the Laney Trust. McQueen stated that she has participated in the lawsuit on her mother's behalf, and that any information provided to Dolores' attorney came from McQueen rather than Dolores.

Though Carolco questioned Dolores' ability to participate as a plaintiff in the case, it never formally requested a hearing where the district court could assess Dolores' capacity, make factual findings on that subject, or determine whether a representative should be substituted to represent her interests. Nor did it assert that the proceedings must stop until such findings were made. Instead, Carolco asserted in its motion for partial summary judgment that, given Dolores' Alzheimer's diagnosis, the court should formally appoint Dolores' daughter or someone else as her representative or issue "'another appropriate order' to protect [Dolores'] interests." The district court did not discuss this request in its ruling, but instead found that Carolco's claims were time-barred.

On appeal, Carolco has changed its approach. Although Dolores has never been adjudged incapacitated, Carolco asserts that she lacked the capacity to sue or be sued because she was diagnosed with Alzheimer's disease. Carolco asserts it was the district court's affirmative duty to address Dolores' capacity when her Alzheimer's diagnosis surfaced, and because it did not, the district court lacked jurisdiction to enter a valid summary-judgment order.

We are unpersuaded by these arguments for at least two reasons. *First*, previous decisions of the Kansas courts demonstrate that a party must raise its questions regarding capacity as soon as possible in litigation—in the vein of an affirmative defense. Carolco's assertions in its summary-judgment briefing were not sufficient to comply with this duty, and the district court did not have an independent obligation to raise the issue here. *Second*, and more importantly, questions regarding a litigant's capacity do not divest the district court of jurisdiction to hear the case.

To start, Carolco's claim that it was the district court's affirmative duty to address Dolores' capacity is misguided. In general, an incapacitated person may sue or defend a lawsuit when represented by a guardian, committee, conservator, or other like fiduciary. K.S.A. 2022 Supp. 60-217(c)(1). The person's interests may also be represented by a guardian ad litem, a next friend, or some other court-appointed representative. K.S.A. 2022 Supp. 60-217(c)(2). When an unrepresented incapacitated person sues someone, the court must appoint a guardian ad litem or devise some other manner of protecting his or her interests. K.S.A. 2022 Supp. 60-217(c)(2); *Belmore v. Goldizen*, No. 121,978, 2021 WL 4127194, at *7 (Kan. App. 2021) (unpublished opinion), *rev. denied* 314 Kan. 854 (2022). But because Dolores has never been declared incapacitated, this statute does not apply—the district court had no duty to appoint Dolores a representative.

Rather, when the question of Dolores' capacity arose, it was Carolco's duty to affirmatively assert—and demonstrate—that Dolores lacked the capacity to participate as a party to the lawsuit:

> "K.S.A. 2014 Supp. 60-209(a)(1) provides that a party bringing a lawsuit does not need to allege in its pleadings that it has the legal capacity to bring suit. Instead, K.S.A. 2014 Supp. 60-209(a)(2) provides that any party wishing to raise an issue about another party's ability to bring suit 'must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.' In essence, the lack of capacity to sue must be specifically raised in defense to an opposing party's claim, just as other affirmative defenses to a claim must be raised. *Cf.* K.S.A. 2014 Supp. 60-208(c)." *Douglas Landscape & Design, L.L.C. v. Miles*, 51 Kan. App. 2d 779, 783-84, 355 P.3d 700 (2015).

Years before *Douglas Landscape*, our Supreme Court stated that "when a defendant raises a plaintiff's lack of capacity to sue, its failure to comply with [K.S.A.] 60-209(a) must be regarded as a waiver of the defense." *Vorhees v. Baltazar*, 283 Kan. 389, 397,

153 P.3d 1227 (2007); *Van Brunt, Executrix v. Jackson*, 212 Kan. 621, 624, 512 P.2d 517 (1973); *Augusta Oil Co., Inc. v. Watson*, 204 Kan. 495, 501, 464 P.2d 227 (1970).

Carolco failed to plead Dolores' lack of capacity as a defense in its original answer or in its answer to the plaintiffs' first amended petition. It did not otherwise ask the district court to address Dolores' capacity until its summary-judgment motion—and even then, it never requested a hearing to determine Dolores' capacity or asserted that Dolores' daughter was not adequately representing her mother's interests.

Carolco asks this court to excuse its failure to raise this issue before the district court, asserting the Kansas Code of Civil Produce is to be liberally construed to ensure just, speedy, and inexpensive determinations of every action and proceeding. K.S.A. 2022 Supp. 60-102. We are unpersuaded. The question of capacity is, at its heart, one that arises out of fairness to and respect for the incapacitated person, to ensure that person's rights are protected. See *Brice-Nash v. Brice-Nash*, 5 Kan. App. 2d 332, 335, 615 P.2d 836 (1980), *cert. denied* 452 U.S. 939 (1981). The recognition that capacity must be affirmatively raised and proven is rooted in the notion that this highly factual issue must be resolved as early as possible in the lawsuit. Absent an affirmative assertion by Carolco and a specific request for a hearing on Dolores' capacity, the district court had no independent duty to question her capacity.

And even if Carolco's summary-judgment briefing were sufficiently timely and thorough to bring this matter to the court's attention, Carolco has pointed to no reason why the district court needed to resolve the question of Dolores' capacity before considering whether Carolco's efforts to collect the 2000 debt and foreclose on the mortgage were barred by the statute of limitations. In an effort to circumvent this reality, Carolco asserts Dolores' alleged incapacity divested the court of any authority—that is, of jurisdiction—to consider the parties' claims.

We note that Carolco never raised this jurisdictional claim before the district court. But even though a court's subject-matter jurisdiction may be considered at any time, Kansas law is clear that capacity to sue is not a jurisdictional issue. See *Vorhees*, 283 Kan. at 396-97 ("subject matter jurisdiction is distinguishable from legal capacity to sue or be sued"); *Hodges v. Phoenix Mut. Life Ins. Co.*, 171 Kan. 364, 370, 233 P.2d 501 (1951) (noting a court must have jurisdiction over a case to determine whether a party has capacity to sue or be sued, and the absence of such a finding "does not oust the jurisdiction"); see also *Mid-Continent Specialists, Inc. v. Capital Homes*, 279 Kan. 178, 185, 106 P.3d 483 (2005) (quoting *Pace Const. Co. v. Missouri Highway and Transp. Com'n*, 759 S.W.2d 272, 274 [Mo. App. 1988]) (standing, a component of subject matter jurisdiction, "'does not relate to the legal capacity to sue, a defense [see K.S.A. 2004 Supp. 60-209(a)] waived unless timely asserted'").

Thus, the lingering question regarding Dolores' mental health did not deprive the district court of jurisdiction to issue the underlying, binding summary-judgment order. Capacity is a fact-intensive issue for the district court to resolve during the initial phase of a case. The district court had no affirmative duty to assess Dolores' capacity before it considered the parties' summary-judgment motions. And the absence of a finding regarding Dolores' capacity did not divest the court of jurisdiction to rule on the pending summary-judgment motions. We turn to the other claims in those motions now.

2. *Carolco's claims regarding the 2000 note and mortgage are barred by the five-year limitations period in K.S.A. 60-511(1).*

The central point of contention in this case is whether Carolco's efforts to enforce the note and mortgage the parties executed in December 2000 is barred by K.S.A. 60-511(1), which requires actions concerning written contracts to be brought within five years. The parties dispute whether the Laneys repaid the loan. But for purposes of summary judgment, we view the facts in the light most favorable to Carolco and thus

presume that the Laneys ceased making any payments on the loan in November 2003. Based on this date, the parties agree that Carolco's efforts to foreclose on the mortgage and collect on the note—which arose in their answer and counterclaim in this lawsuit in January 2020—are well outside the five-year limitations period. The district court thus granted summary judgment in the Laneys' favor.

Carolco raises several arguments why K.S.A. 60-511(1) should not bar its claims:

- Carolco asserts that the five-year limitations period never commenced, arguing that the company had the option to forbear on the debt and did not accelerate the full loan until it filed its counterclaim.

- Carolco claims that the parties modified the terms of the note and mortgage in 2002 (in their discussions at the casino), and the Laneys did not fully breach the new agreement until 2017, when Dolores transferred the house to the Laney trust without paying off the Carolco debt.

- Carolco claims that the Laneys should be estopped from relying on the statute of limitations to bar Carolco's efforts to collect the debt, as the company relied on the Laneys' promise in 2002 that they would sell the house and use it to pay off the loan.

We do not find these arguments persuasive and agree with the district court that the statute of limitations has extinguished Carolco's claims. We thus affirm the court's grant of summary judgment to the Laneys.

2.1. *Viewing the facts in the light most favorable to Carolco, the five-year limitations period began when the Laneys defaulted on the note in 2003.*

Carolco first argues that the district court erred when it found that Carolco's counterclaim to foreclose on the mortgage and collect the debt was barred by K.S.A. 60-511(1). According to Carolco, the loan never matured—meaning the full debt never became due and the statutory limitations period did not commence—because the company did not exercise its option to accelerate the balance due. Carolco argues it did the opposite of accelerating the loan by allegedly agreeing to defer the Laneys' loan payments until they sold the property.

"An acceleration clause provides that the entire balance of [a loan] becomes due and payable upon the occurrence of any event of default." *Foundation Property Investments v. CTP*, 286 Kan. 597, 603, 186 P.3d 766 (2008). Carolco's claim that the loan never matured hinges on the wording of the acceleration clauses in the note and mortgage—and more specifically, whether the debt automatically became due when the Laneys stopped making payments on the loan.

Kansas recognizes two types of acceleration clauses: optional and automatic. 286 Kan. at 603-04.

- An automatic acceleration clause is one "where the acceleration is absolute in its terms—where the note according to its terms becomes due on default and does not contain any optional features." 286 Kan. at 604; see, e.g., *Miles v. Hamilton*, 106 Kan. 804, 806, 189 P. 926 (1920) (acceleration clause was automatic when it "provided that if any interest should not be paid when due the whole of the debt, principal and interest, should immediately become due and payable"). If an acceleration clause is automatic, the statute of limitations begins to run upon

default. *FGB Realty Advisors, Inc. v. Keller*, 22 Kan. App. 2d 853, 854, 923 P.2d 520, *rev. denied* 261 Kan. 1084 (1996).

- An optional acceleration clause contains language showing that the acceleration of the loan requires some action. *Foundation Property*, 286 Kan. at 605-06. If the acceleration clause is optional, the statute of limitations does not begin to run until the lender chooses to exercise the option to accelerate the debt upon default. *FGB Realty Advisors*, 22 Kan. App. 2d at 854. And if the lender does not exercise its option to accelerate the debt, the statute of limitations does not begin to run sooner than the time set for the loan to mature in the note. 22 Kan. App. 2d at 854.

Some optional acceleration clauses expressly state that acceleration may occur "at the option" of the loan holder. *Foundation Property*, 286 Kan. at 603 ("'Upon default in payment of any interest, or any installment in principal, the whole amount then unpaid shall become immediately due and payable *at the option* of the holder without notice.'" [Emphasis added.]). But no express language is necessary for an acceleration clause to be optional. 286 Kan. at 604-05 (optional acceleration clause need not say "at the option" of a party). Any term that clearly conveys that one of the parties has the right to determine that the balance of the loan will be due in the case of default is an optional acceleration clause. 286 Kan. at 605-06.

Applying these principles here, there can be no question that the *note's* acceleration clause is automatic. The note states: "If default is made in payment of any installment when due, then all the remaining installments shall become due and payable at once, and bear interest at 12% per annum." The note's acceleration clause thus does not contain any language, express or otherwise, suggesting that acceleration is optional upon some sort of action by Carolco. Rather, it provides that in the event of default—which occurred at the latest in late 2003—all remaining installments become due.

Carolco does not dispute this language. Instead, it points to language in the *mortgage*, executed the same day, indicating that Carolco would have the option to foreclose on the mortgage in the event of the Laneys' default. The mortgage states that if any part of the debt—principal or interest—is not paid when due, then "the whole of said sums and interest shall, *at the option of [Carolco]*, by virtue of this Mortgage, immediately become due and payable." (Emphasis added.) Carolco asserts that this language should be construed to indicate that the full debt did not automatically accelerate when the Laneys stopped making payments on the loan.

We agree that, in isolation, the mortgage's language would create an option for Carolco to accelerate the full debt. But Kansas law does not support such an isolated reading. Rather, our caselaw demonstrates that the language of notes and mortgages—including the acceleration clauses in those instruments—must be read and construed together, if possible. See *Farmers & Merchants Bank v. Copple*, 190 Kan. 170, Syl. ¶ 2, 373 P.2d 219 (1962). For this reason, courts have upheld actions by lenders to accelerate loans and foreclose on a mortgage when borrowers have failed to comply with some term of a mortgage (such as acquiring homeowners' insurance), even when the borrowers have made timely payments on the note. See 190 Kan. at 175-76.

More than a century ago, the Kansas Supreme Court applied this principle to a similar set of facts and concluded that when a note and accompanying mortgage executed at the same time contain different types of acceleration clauses, the terms of the note control. See *Kennedy v. Gibson*, 68 Kan. 612, 616-17, 75 P. 1044 (1904). This is because the note controls the transaction—"[t]he note contains the obligations of the mortgagors, and the mortgage, concurrently executed, is an incident to and security for the note." 68 Kan. at 617.

This sound reasoning applies with equal force to this case. Carolco's isolated reading of the language in the mortgage would nullify the express automatic acceleration

clause in the note—the instrument the mortgage was intended to secure. Thus, the full debt became due when the Laneys defaulted on the note, triggering the five-year limitations period in K.S.A. 60-511(1).

Before turning to Carolco's remaining arguments, we observe that the district court agreed that the full debt automatically became due when the Laneys defaulted on the loan. But the court alternatively found that even if the Laneys modified the terms of the original note and mortgage in their discussions at the casino in 2002, that modification served to accelerate the previous debt under the note (given the Laneys' earlier default). For the reasons we discuss in the following section, we conclude that the statute of frauds bars any enforcement of the alleged oral modification of the loan in 2002. We therefore need not consider further the district court's alternative finding that Carolco's claims were time-barred even if Carolco accelerated the debt in 2002.

Because the note's acceleration clause is automatic, the full debt became due when the Laneys defaulted on the loan. Viewing the facts in the light most favorable to Carolco, this default occurred at the latest in 2003 when the Laneys stopped making payments on the loan. Thus, the five-year limitations period expired—at the latest—in 2008. The district court correctly concluded that the statute of limitations bars Carolco's claims.

2.2. *The statute of frauds precludes enforcement of the alleged oral agreement in 2002.*

As an alternative to its arguments concerning the acceleration clause, Carolco asserts that its efforts to foreclose on the mortgage and collect on the note were not barred by the five-year limitations period in K.S.A. 60-511(1) because the parties orally modified their agreement at the casino in 2002. According to Carolco, under this modified agreement the Laneys had agreed to sell their house to pay for the loan, and

Carolco had no obligation to take any action to enforce its rights until Dolores transferred the house to the Laney Trust in 2017. But the alleged oral modification on which Carolco relies cannot be enforced under Kansas' statute of frauds.

K.S.A. 33-106 requires certain agreements—including contracts involving interests in real estate and agreements that cannot be performed within one year—to be memorialized in writing. That statute, commonly known as the statute of frauds, has been in effect since the beginning of Kansas statehood and was enacted to prevent fraud and injustice in these transactions. See *Ayalla v. Southridge Presbyterian Church*, 37 Kan. App. 2d 312, 316, 152 P.3d 670 (2007). "If an agreement is within the statute of frauds and must be in writing to be enforceable, any substantial modification of the agreement, to be enforceable, must likewise be in writing and signed by the party to be charged therewith." *Dickinson, Inc. v. Balcor Income Properties Ltd-II*, 12 Kan. App. 2d 395, Syl. ¶ 2, 745 P.2d 1120 (1987), *rev. denied* 242 Kan. 902 (1988).

Despite this rule, Kansas law recognizes that some limited, insubstantial modifications to contracts—slight alterations to the mode or time of performance—may be enforced even if they are not written. See, e.g., *Comer v. Shoemaker*, 134 Kan. 605, 606, 7 P.2d 500 (1932) (orally altering the details of mode or time of performance); *Hughes v. Knapp*, 109 Kan. 183, 186, 197 P. 862 (1921) (orally altering the details of performance). Neither party contests that the alleged oral agreement in 2002 is within the statute of frauds. But Carolco asserts that this alleged agreement with the Laneys is still enforceable because it was an insubstantial modification—it only altered the details of performance and the timing in which Carolco would be entitled to payment. According to Carolco, the agreement did not alter the parties to the loan, the amount due, the interest rate, or the property secured by the loan.

But contrary to these assertions, the alleged oral agreement would have modified the terms of the note and mortgage in several important ways. The note specified that if

the Laneys defaulted on any payment, all the remaining installments were immediately to become due with interest. And the mortgage gave Carolco the right to foreclose on the home under multiple scenarios. But the 2002 conversation allegedly suspended Carolco's right to foreclose on the mortgage in exchange for the Laneys' agreement to fully repay the loan in 2003. And it further altered the original agreement by requiring the Laneys to market and sell their house to pay off the note and mortgage, pay real estate taxes and home casualty insurance, and to maintain the property while selling it.

Carolco's assertion that this conversation merely altered the details of performance and the timing in which Carolco would have a right to payment is unfounded. These supposed modifications are substantial: a surrender of Carolco's right to foreclose on the mortgage, a new agreement to satisfy the rest of the loan before its original maturation, and a new obligation on the Laneys to pay expenses related to marketing the property for sale. Under the statute of frauds, any such modification to the parties' agreement had to be memorialized in writing to be enforceable.

Before turning to Carolco's remaining argument, we pause to note, as the district court observed, that even if the alleged agreement in 2002 was enforceable, Carolco's efforts to enforce the note and mortgage would still be time-barred. The fact remains that the Laneys defaulted on the loan in 2003. Any actions based on oral agreements must be brought within three years of a breach. K.S.A. 60-512(1). Thus, whether Carolco sought to enforce its rights under the 2000 note and mortgage or compel the Laneys' performance under the alleged oral agreement in 2002, the counterclaim it filed in 2020 was well outside the timeframe permitted by Kansas law.

This case illustrates the wisdom of the statute of frauds. Carolco seeks to enforce an alleged oral agreement made over two decades ago. If this passage of time was not enough to dull recollections of the discussion, two of the four people involved in the conversation—Kenneth Laney and Harold Jenkins—are no longer living. Dolores Laney

does not remember the conversation. Most of the evidence about the conversation comes from a sworn statement from Jarvis, Carolco's former attorney who surrendered his law license and was disbarred in 2019. These circumstances illustrate why a writing is necessary to avoid fraud or injustice. The alleged modification of the parties' contract cannot be enforced under K.S.A. 33-106.

2.3. *Promissory estoppel does not save Carolco's claims, as Carolco has not shown that it reasonably relied on any action by the Laneys.*

In its final argument on appeal, Carolco asserts that even if the alleged agreement in 2002 did not modify the terms of the note, Carolco nevertheless relied on the Laneys' promise to sell the home and pay off the debt. Carolco thus claims that the Laneys should be estopped from asserting the statute of limitations to bar Carolco's claims.

The district court found that estoppel principles did not apply to Carolco because the Laneys never induced any action (or nonaction) from the lender. We agree that the Laneys are not estopped from raising their statute-of-limitations defense, but for different reasons. See *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015) (upholding a district court's decision when it reached the correct result but for a different reason).

Promissory estoppel is an equitable doctrine "designed to promote some measure of basic fairness when one party makes a representation or promise in a manner reasonably inducing another party to undertake some obligation or to incur some detriment as a result." *Bouton v. Byers*, 50 Kan. App. 2d 34, 41, 321 P.3d 780 (2014), *rev. denied* 301 Kan. 1045 (2015). In some instances, promissory estoppel will warrant enforcing a promise that otherwise would be barred by the statute of frauds because a party has reasonably acted upon another's assurances. *Bittel v. Farm Credit Svcs. of Central Kansas, P.C.A.*, 265 Kan. 651, 659, 962 P.2d 491 (1998).

Promissory estoppel may apply when "(1) a promisor reasonably expects a promisee to act in reliance on a promise; (2) the promisee, in turn, reasonably so acts; and (3) a court's refusal to enforce the promise would countenance a substantial injustice." *Bouton*, 50 Kan. App. 2d at 41. Because promissory estoppel focuses on fairness, its application depends on the facts of each case. 50 Kan. App. 2d at 41; see Restatement (Second) of Contracts § 90, comment b (1981).

Carolco argues it reasonably believed that the Laneys were attempting to sell their home because the Laneys placed a "For Sale" sign in the yard at some point after they defaulted on the loan. Thus, Carolco presumed that the Laneys intended to comply with the parties' oral discussions in 2002, and the company thus reasonably opted not to foreclose on the home when the Laneys defaulted on their loan.

The reasonableness of a person's reliance on an alleged promise often depends on disputed facts, and thus the issue is usually inappropriate for summary judgment. See 50 Kan. App. 2d at 43, 45; *Kincaid v. Dess*, 48 Kan. App. 2d 640, 653-54, 298 P.3d 358, *rev. denied* 297 Kan. 1246 (2013). But when the facts are undisputed, the district court may rule on the availability of promissory estoppel as a matter of law. See *Rex v. Warner*, 183 Kan. 763, 769, 332 P.2d 572 (1961). That is the case here.

Even assuming that Carolco's factual assertions are true, it was unreasonable for the company to believe that it could wait indefinitely for the Laneys to sell their home, with the debt continuing to accrue interest, without taking any further steps to secure its rights. Kansas law requires parties to take action on written and oral contract claims within five or three years, respectively. K.S.A. 60-511(1); K.S.A. 60-512(1). Yet for more than 16 years—from late 2003 to January 2020—Carolco never asked about the sale of the Laneys' home or the repayment of the loan. And although courts have recognized that principles of equity may extend a limitations period, those cases generally involve plaintiffs who have delayed filing past the statutory deadline at the

inducement of the defendant. See *Dunn v. Dunn*, 47 Kan. App. 2d 619, 639, 281 P.3d 540 (2012) ("A common factual thread running through the cases is conduct by a party that lulls the adverse party into a false sense of security, forestalling the filing of suit until the statute has run."), *rev. denied* 296 Kan. 1129 (2013). Here, even after the statutory limitations period expired on Carolco's claims, the company waited more than a decade before seeking to enforce its rights under the note and mortgage.

Thus, even if Carolco relied on the alleged 2002 agreement in not foreclosing on the Laneys' house in 2003, the company's inaction for 16-plus years was unreasonable. Carolco cannot rely on promissory estoppel to avoid the statutory limitations period that bars its stale claims.

In summary, K.S.A. 60-511(1) bars Carolco's efforts to collect on the December 2000 note and to foreclose on the accompanying mortgage. Under the plain language of the note, the Laneys' entire debt became due when they defaulted on the loan. This default occurred, at the latest, when the Laneys stopped making payments on the debt in late 2003. The statute of frauds prevents Carolco from enforcing an alleged oral modification to that agreement, which was never memorialized in writing or signed by the parties. And Carolco has not shown that the Laneys should be estopped from asserting the statute of limitations here, as Carolco's decision not to foreclose on the mortgage or collect on the note for more than 16 years—supposedly relying on the oral modification—was unreasonable.

The district court did not err when it granted summary judgment to the Laneys based on the statute of limitations.

Affirmed.