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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-793**

Jovani Nassar, et al.,
Appellants,

vs.

Fady Chamoun, et al.,
Respondents.

**Filed February 13, 2012
Affirmed in part, reversed in part, and remanded
Collins, Judge***

Dakota County District Court
File No. 19HA-CV-10-499

James Scott Andresen, Janine M. Loetscher, Bassford Remele, PA, Minneapolis,
Minnesota (for appellants)

James A. Reding, Reding & Pilney, Lake Elmo, Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

In this surface-water-drainage dispute, appellants Jovani Nassar and Sonia Morales challenge the district court's order granting summary judgment in favor of their neighbors, respondents Fady and Sylvana Chamoun. Because we conclude that the district court erroneously granted summary judgment on two of appellants' claims, we affirm in part, reverse in part, and remand.

FACTS

In March 2008, respondents entered into a residential purchase agreement with a developer to purchase a newly constructed home in Rosemount's Glendalough Community. In August 2008, appellants entered into a purchase agreement with the same developer to purchase a newly constructed home in a lot directly adjacent to respondents' property.

The purchase agreements each contained a "master disclosure and information addendum" (master plan). Paragraph 13.2 of the master plan provided for drainage and utility easements along the perimeter of every homesite in Glendalough Community. It provided further that, "Nothing may be done in any drainage and utility easement area to impede the drainage of surface water." Accordingly, the master plan prohibited, specifically, "landscaping . . . in the drainage and utility easement areas, because [that] might change the drainage pattern." A survey of the properties owned by appellants and respondents shows that each property has a five-foot-wide drainage and utility easement bordering each other's property. Other surveys and photographs show that, contrary to

the terms of the purchase agreement, respondents installed landscaping within the parties' common-boundary drainage easement.

In or about July 2009, appellants began to landscape their property and discovered a grading problem that caused surface water to drain from respondents' property onto appellants' property. Appellants believed this problem was due to respondents' landscaping within the parties' common-boundary drainage easement. After failing to reach agreement to remedy the problem, appellants filed a complaint against respondents in December 2009, asserting tort claims of negligence, nuisance, and trespass, and a breach-of-contract claim based on respondents' violation of the landscaping restrictions contained in respondents' purchase agreement with the developer.

Respondents moved for summary judgment on the grounds that (1) appellants did not suffer damages and (2) appellants could not enforce the terms of respondents' purchase agreement as third-party beneficiaries because appellants were not intended beneficiaries of that contract. Appellants responded in opposition to summary judgment, and also moved for a "mandatory" injunction requiring respondents to remove landscaping from the drainage easement and to re-grade and maintain the area within the easement to conform to their purchase agreement.

The district court granted summary judgment in favor of respondents on all claims. The court found that appellants were not third-party beneficiaries to respondents' purchase agreement and, therefore, could not enforce the terms of that agreement. The court also found that the tort claims, as pleaded, were based on appellants' asserted rights under respondents' purchase agreement and, therefore, because appellants had no such

rights, these claims failed as a matter of law. The district court denied appellants' motion for a mandatory injunction without elaboration. This appeal followed.

D E C I S I O N

I.

Summary Judgment

The district court shall grant summary judgment if, based on the entire record, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. This court conducts a de novo review of the district court's summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

A. Third-party beneficiary claim

Third-party beneficiaries may be either intended beneficiaries or incidental beneficiaries. *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984) (relying on and adopting Restatement (Second) of Contracts § 302 (1979)). A third party can enforce a contract as an intended beneficiary if recognition of third-party beneficiary rights is appropriate and the third party meets either the "duty owed" test or the "intent to benefit" test. *Id.*

Appellants contend only that they meet the intent-to-benefit test. To satisfy this test, "circumstances [must] indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302(1)(b); *Cretex*, 342 N.W.2d at 139. To ascertain the parties' intent, courts look to the

surrounding circumstances at the time of contracting, and generally require the contract to express some objective manifestation of intent to benefit a third party. *Hickman v. Safeco Ins. Co. of Am.*, 695 N.W.2d 365, 370, 370 n.7 (Minn. 2005); *Cretex*, 342 N.W.2d at 140. Absent ambiguity, the surrounding circumstances do not include extrinsic evidence. *See Hickman*, 695 N.W.2d at 371.

Appellants seek to enforce paragraph 13.2 of the master plan contained in respondents' purchase agreement. But nothing in this paragraph expresses an intent to benefit appellants or any other third party. Moreover, nothing in the contract as a whole or the circumstances surrounding the contract shows an express intent to benefit anyone other than the parties to that contract; respondents and the developer.

Relying on *Hickman*, appellants argue that the contract expressly intends to benefit them as "homeowners" in Glendalough Community. In *Hickman*, the supreme court held that a borrower was a third-party beneficiary because the pertinent contract, by its own terms, expressly conferred a benefit on a "borrower." *Id.* at 370-71. Here, however, the terms of respondents' purchase agreement do not purport to confer any benefits on a "neighboring homeowner." Without an express manifestation of intent, or anything else in the contract indicating intent to benefit neighboring homeowners, appellants are, at best, incidental beneficiaries to respondents' purchase agreement. As determined by the district court, appellants "were not intended beneficiaries" and are "preclude[d] . . . from enforcing [the agreement] as third party beneficiaries. *See Hickman*, 695 N.W.2d at 370-71; *Cretex*, 342 N.W.2d at 138-39.

B. Tort claims

Appellants make two arguments against the district court's grant of summary judgment on their common-law negligence, nuisance, and trespass claims. First, they argue that the district court erred in sua sponte granting summary judgment in favor of respondents based on grounds not raised by respondents. Second, they argue that the district court erroneously applied the law with respect to these claims.

1. Sua sponte dismissal of tort claims

A district court may grant summary judgment sua sponte so long as the adverse party is afforded a meaningful opportunity to oppose such an action. *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. App. 2003); *Doe v. Brainerd Int'l Raceway, Inc.*, 514 N.W.2d 811, 822 (Minn. App. 1994), *rev'd on other grounds*, 533 N.W.2d 617 (Minn. 1995).

Appellants contend that they did not have a meaningful opportunity to oppose the motion for summary judgment on the basis relied on by the district court. The district court granted summary judgment to respondents based on its conclusion that appellants do not have standing to enforce respondents' purchase agreement. But whether appellants have standing to enforce respondents' purchase agreement is directly encompassed within respondents' argument that appellants are not third-party beneficiaries to the purchase agreement and, therefore, cannot enforce the terms of the purchase agreement. Regardless of whether respondents expressly tied this argument to appellants' tort claims, appellants had a meaningful opportunity to address the basis of the district court's ruling, namely, whether they are intended beneficiaries of

respondents' purchase agreement. Indeed, appellants devoted over four pages to this very argument in their response in opposition to respondents' motion for summary judgment. Therefore, we find no error in the district court's decision to consider appellants' tort claims for summary judgment on this basis.

2. *Merits of tort claims*

Appellants contend that their common-law claims of negligence, nuisance, and trespass, as pleaded in the complaint, do not depend upon a contractual duty and, therefore, their inability to enforce respondents' purchase agreement does not act to defeat these claims.

“Landowners owe a duty to use their property so as not to injure that of others.” *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 186 (Minn. 2005). The drainage of surface water onto neighboring land is governed by the reasonable-use doctrine, which balances the benefits of drainage with the harm to the neighboring landowner. *See id.*; *Highview N. Apts. v. Cnty. of Ramsey*, 323 N.W.2d 65, 71-72 (Minn. 1982); *Enderson v. Kelehan*, 226 Minn. 163, 167-69, 32 N.W.2d 286, 289 (1948); *Matter v. Nelson*, 478 N.W.2d 211, 214 (Minn. App. 1991). Those injured by the drainage of water onto their land can generally allege claims arising under negligence, nuisance, and/or trespass, but, regardless of what claim is brought, the analysis is governed by the reasonable-use doctrine. *See Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984); *Highview*, 323 N.W.2d at 70-72; *Matter*, 478 N.W.2d at 214.

a. *Negligence*

The elements of negligence are: (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *Anderson*, 693 N.W.2d at 186 n.1. Because all landowners have a duty to use their property so as not to injure that of others, the unreasonable drainage of surface water may give rise to an action in negligence. *See id.*; *Wilson*, 352 N.W.2d at 394; *Highview*, 323 N.W.2d at 72.

Appellants' negligence claim alleges that respondents have "a duty to install landscaping and maintain the drainage easement in conformance with the purchase agreement and to prevent drainage and runoff from [their] property onto the property owned by [appellants]." The complaint also alleges that respondents breached this duty by "negligently installing landscaping in and around the drainage easement and failing to maintain the drainage easement in conformance with the purchase agreement." Although not a model of clarity, the complaint adequately alleges two distinct duties: the first arising from a contractual duty to abide by the purchase agreement, and the second arising from respondents' duty to use their land so as not to injure the land of others. Because this second duty is based on the reasonable-use doctrine, and not on a contractual obligation arising out of respondents' purchase agreement, appellants' lack of standing to enforce respondents' purchase agreement does not defeat this theory of their negligence claim. Accordingly, the district court erred in granting summary judgment to respondents on this claim.

b. Nuisance

A nuisance is “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Minn. Stat. § 561.01 (2010). The conduct causing the nuisance harm must be “wrongful.” *Highview*, 323 N.W.2d at 70-71. Thus, because a nuisance arising from the drainage of surface water is governed by the reasonable-use doctrine, the drainage of surface water is “wrongful” within the meaning of a nuisance action only if such conduct is found to be unreasonable after application of the reasonable-use doctrine. *Id.*; *Matter*, 478 N.W.2d at 214.

Appellants’ nuisance claim alleges that respondents created a nuisance due to their “negligence and unreasonable use of [their] property through installation of landscaping in and around the drainage easement and failure to maintain the proper grade within the drainage easement.” The complaint further alleges that this conduct “unreasonably . . . created runoff and drainage of water onto property owned by [appellants].” Again, although not a model of clarity, the complaint adequately alleges two distinct bases for the nuisance: one based on a contractual duty to maintain the proper grade within the drainage easement, and the other based on Minn. Stat. § 561.01. With respect to this second basis, appellants alleged that the wrongful conduct causing the nuisance is due to respondents’ unreasonable use of their land, which adequately alleges a nuisance in the context of surface water drainage. *See Highview*, 323 N.W.2d at 70-71; *Matter*, 478 N.W.2d at 214. Thus, appellants’ lack of standing to enforce

respondents' purchase agreement does not defeat this theory of their nuisance claim, and the district court erred in granting summary judgment to respondents on this claim.

c. Trespass

Trespass encompasses any unlawful interference with one's property and requires "a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant." *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 550 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). Appellants contend that "unlawful" in this context simply means "without consent." But trespass actions based on the drainage of surface water are governed by the reasonable-use doctrine. *See Highview*, 323 N.W.2d at 72. Thus, the drainage of surface water is "unlawful" within the meaning of a trespass action only if that drainage is found to be unreasonable after application of the reasonable-use doctrine.

But unlike their negligence and nuisance claims, appellants' trespass claim does not assert a common-law claim implicating the reasonable-use doctrine. Instead, the trespass claim alleges only that respondents acted "in violation of the purchase agreement" and "without consent." Because consent is irrelevant in this context, and appellants lack standing to enforce respondents' purchase agreement, the district court correctly granted summary judgment to respondents on this claim.

II.

Mandatory Injunction

Appellants argue that the district court erred in denying their motion for a "mandatory" injunction. Appellants' motion for a mandatory injunction sought

permanent injunctive relief. Whether the district court erred in denying a motion for a permanent injunction is analyzed under an abuse-of-discretion standard. *Cherne Indus., Inc. v. Grounds Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn. 1979).

“Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist *before* injunctive relief may be granted.” *Smith v. Spitzenberger*, 363 N.W.2d 470, 472 (Minn. App. 1985) (quotation omitted). “A permanent injunction will issue only after a right to such relief has been established at a trial.” *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. App. 1987). Thus, before permanent injunctive relief may be awarded, the merits of a dispute must be determined. *Id.*

A resolution of appellants’ motion for a permanent injunction is premature. Appellants based their motion for a permanent injunction on their nuisance claim. But unless and until appellants ultimately succeed on the merits of this claim, they are not entitled to a permanent injunction. *See id.*

III.

Conclusion

Appellants are, at best, incidental beneficiaries to respondents’ purchase agreement and, therefore, cannot enforce the terms of that agreement as third parties. Because appellants’ trespass claim alleged only that the unlawful entry of water onto their land arose due to respondents’ violation of the purchase agreement, the district court did not err in granting summary judgment on this claim. However, appellants’ common-law negligence and nuisance claims relied, in part, on application of the reasonable-use doctrine. Therefore, summary judgment was improperly granted on these claims.

Finally, appellants may become entitled to a permanent injunction only in the event they ultimately succeed on the merits of their nuisance claim, not before.

Affirmed in part, reversed in part, and remanded.