STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1806

Megan Hoy,
Appellant,

vs.

Debra Niemela, et al.,
Defendants,
Bank of New York,
Respondent,
First American Title Insurance Company,
Respondent.

Filed June 17, 2013
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Hennepin County District Court
File No. 27CV1112471

Ryan J. Trucke, Matthew R. Doherty, Brutlag, Hartmann & Trucke, P.A., Plymouth, Minnesota (for appellant)

David R. Mortensen, Wilford, Geske & Cook, P.A., Woodbury, Minnesota (for respondent Bank of New York)

Kevin J. Dunlevy, Diann L. Dunlevy, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for respondent First American Title Insurance Company)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Appellant contends that the district court erred by (1) dismissing her complaint against respondents; (2) granting respondents' motions for summary judgment; and (3) denying her motion for partial summary judgment. We affirm in part, reverse in part, and remand.

FACTS

On December 1, 2005, defendant Debra Niemela purchased a condominium and garage in Minneapolis. These properties are legally described as: "Unit 101, Common Interest Community No. 1622, 4227 Nicollet Condominiums, a Condominium located in Hennepin County, Minnesota" (the condominium); and "Unit G1, Common Interest Community No. 1622, 4227 Nicollet Condominiums, a Condominium located in Hennepin County, Minnesota" (the garage). It appears that the actual conveyance to Niemela omitted the description for garage unit G1.

Two mortgages secured the property, which were later assigned to respondent Bank of New York Mellon (BONYM) and thereafter foreclosed. The legal description for the foreclosed property included only the condominium, not the separate garage unit. After foreclosure, and unbeknownst to BONYM, Niemela received a deed conveying the separate garage unit to her. Niemela simply retained the deed and it was not recorded.

BONYM then listed the condominium for sale. Its listing stated that the property included a "private garage." On November 26, 2007, appellant Megan Hoy purchased the condominium and garage. The private garage, being the only garage in the

condominium development, significantly contributed to Hoy's decision to purchase the condominium. The BONYM to Hoy purchase agreement described the property as "CIC #1662, 4227 Nicollet, Condo #101, to include garage stall #101 and one storage unit in building." At closing, BONYM delivered a trustee's deed to Hoy conveying the condominium unit, but not including the garage unit. Hoy was also provided the garage-door opener for the garage unit.

Also at closing, Hoy purchased title insurance from respondent First American Title Insurance Company (FATIC). The policy states that covered risks include when "[s]omeone else owns an interest in Your Title." The policy similarly includes only the legal description of the condominium property. There is no mention of the separate garage unit.

Three years later, Hoy decided to sell the property. The day after listing it for sale, she received a delinquent real estate tax notice from Hennepin County relating to the garage unit. The notice was Hoy's first indication that she did not have legal title to the garage, even though she had the exclusive use of it. Hoy hired counsel, and following counsel's advice paid $728.11 in delinquent taxes and filed a lien pursuant to Minn. Stat. § 272.45 (2010) for paying taxes on property she did not own. She also tendered a claim to FATIC requesting coverage under her title insurance policy. FATIC denied her claim

Hoy began essentially a quiet title action, suing Niemela, BONYM, and FATIC, in an attempt to obtain title to her garage. Upon being served with the lawsuit, Niemela provided Hoy the unrecorded deed she had been holding, and she executed a quit claim deed to the garage unit in favor of Hoy, all in exchange for her dismissal from the

lawsuit. BONYM and FATIC (collectively "respondents") moved for summary judgment, and Hoy moved for partial summary judgment. The district court granted the motions of BONYM and FATIC and denied Hoy's motion, dismissing Hoy's complaint in its entirety. The district court denied Hoy's motion for amended findings and conclusions. This appeal follows.

D E C I S I O N

I. Standard of review

"We review a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). The reviewing court views the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see* Minn. R. Civ. P. 56.03. No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original).

II. Breach of contract (BONYM)

Hoy contends that the district court erred by finding that BONYM did not breach its contract with Hoy. The district court found that BONYM had not breached the contract because proof of damages is essential to Hoy's claims, and Hoy had not proved

damages. We review de novo whether the district court erred in its application of the law. *See Riverview Muir Doran*, 790 N.W.2d at 170.

"Absent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). "When the intent of the parties can be determined from the writing of the contract, the construction of the instrument is a question of law for the court to resolve, and this court need not defer to the district court's findings." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213, 221 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Jan. 20, 2004). "A claim of breach of contract requires proof of three elements: (1) the formation of a contract; (2) the performance of conditions precedent by the plaintiff; and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). A party must also prove damages arising from the breach in order to prevail. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, N. J.*, 535 N.W.2d 671, 675 (Minn. App. 1995), *review denied* (Minn. Oct. 18, 1995).

It is undisputed that Hoy and BONYM have a valid and enforceable contract–the purchase agreement. It is also undisputed that Hoy complied with the conditions precedent to BONYM's performance, paying the contract price for the condominium and associated garage. The issue then is whether BONYM breached the terms of the purchase agreement by failing to convey all of the property.

The purchase agreement states that the property to be conveyed is described as "CIC #1662 4227 Nicollet, Condo #101, to include garage stall #101 and one storage unit in building." This statement clearly shows that BONYM intended to convey title to the garage unit to Hoy. Further, BONYM's property listing stated that the property included a private garage, and BONYM gave Hoy the garage-door opener at closing. BONYM has consistently maintained that it meant to convey the garage to Hoy because it believed it owned the garage. Now realizing that it never owned the garage, BONYM asserts an equitable interest in the garage that was validly conveyed to Hoy when she purchased the condominium.

But, at no time did BONYM have an ownership interest in the garage, nor did it convey the garage unit to Hoy as required by the purchase agreement. The record shows that BONYM acquired the condominium unit at the Niemela foreclosure sale, but that sale did not include the separate garage unit. Yet, post foreclosure BONYM listed the property for sale representing that it included the garage unit. BONYM clearly intended to convey the garage to Hoy. However, BONYM did not—and could not—convey the garage unit to Hoy because *record* title was still in the name of Niemela's predecessor. And, the Hoy purchase agreement required BONYM to convey the condominium unit and the garage unit to Hoy by "warranty deed." BONYM therefore breached the terms of the purchase agreement by failing to convey the garage unit to Hoy.[1]

BONYM now contends that the following statements in the purchase agreement relieve it of liability: "Buyer understands and acknowledges that . . . seller has little or no

[1] BONYM has yet to convey the garage.

direct knowledge about the condition of the property. Buyer agrees that buyer is buying the property 'as is' . . . ." But these statements go to the physical condition of the property, not to legal and marketable title. The "property" at issue was clearly intended (by BONYM's purchase agreement) to include the garage.[2] These statements do not negate this fact, or the fact that BONYM contracted to sell Hoy property that it later failed to convey to her, breaching the terms of the purchase agreement. We reverse the district court's ruling on this issue.

III. Findings on ownership of garage

Hoy contends that the district court erred by finding that BONYM owned the garage. Hoy highlights the inconsistency in the district court's finding that BONYM "owned the garage" but also "never held title to the garage." Findings of fact "shall not be set aside unless clearly erroneous." Minn. R. Civ. P. 52.01.

The district court's findings are clearly contradictory. Either BONYM owned the garage and held title to the garage, or BONYM did not own the garage and did not hold title to the garage. BONYM admits that it has never held title to the garage, and this admission is supported by the record. The garage was belatedly conveyed to Niemela on March 28, 2007, long after she lost the condominium unit to foreclosure. She in turn conveyed the garage unit to Hoy on June 28, 2011. At no point was title to the garage in

[2] The record does not indicate how BONYM, its realtor, its title insurer, and its closer could allow the sale to close without discovery of the serious title defect.

the name of BONYM or in BONYM's "chain of title." BONYM never owned the garage. Any other finding is clearly erroneous.[3]

IV. Hoy's damages

Hoy contends that she has suffered damages in the form of (1) attorney's fees and costs associated with attempting to perfect title to the garage, (2) the lost opportunity to sell the condominium on the basis of a defective title, and (3) the value of the unconveyed garage, which she alleges is between $15,000 and $24,000. The district court granted respondents' motions for summary judgment, finding that Hoy had not suffered damages because Hoy now has title to the garage. We review this issue de novo. *See Riverview Muir Doran, LLC*, 790 N.W.2d at 170.

"[A] vendor is liable for damages for breach of contract for failure to convey marketable title where the vendor has otherwise agreed to convey marketable title." *Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 448 (Minn. 1980). In an action to recover damages for an alleged breach of contract to sell real estate, the measure of damages is "the difference between the contract price and the actual or market value of the property at the time of the breach, including any expenses necessarily incurred by the vendor in his effort to carry out the contract." *Frank v. Jansen*, 303 Minn. 86, 94-95, 226 N.W.2d 739, 745 (1975) (quotation omitted).

[3] We understand that BONYM, as a reluctant post-foreclosure owner of condominium unit #101, relied on its various agents, realtors, title insurance companies, and closers for professional advice in the foreclosure, and post-foreclosure marketing, selling, closing, and conveyancing processes, but the ultimate responsibility rests with BONYM.

There was no separate contract price for the garage unit at the time of Hoy's purchase of the condominium unit. Hoy purportedly purchased the garage from BONYM as a part of the transaction, but BONYM never owned it. Further, when Hoy obtained title to the garage via the deed from Niemela, no monetary consideration was tendered.

There is a more general form of damages available to non-breaching parties in a breach-of-contract claim. "The rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." *Id.*, at 96, 226 N.W.2d at 745 (quotation omitted).

> [D]amages which one party to a contract ought to receive in respect to a breach of it by the other are such as (1) either arise naturally, that is, in the usual course of things, from the breach itself, or (2) such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as a probable result of breach.

Id.

Here, Hoy clearly incurred damages in timely hiring counsel and initiating a lawsuit against Niemela and the other defendants, in attempts to obtain title and ultimately securing the Niemela quit claim deed. She also incurred damages in prosecuting this lawsuit. And had Hoy received title to the garage unit, as was clearly intended, she would not have incurred these expenses. The measure of damages should, at a minimum, be Hoy's costs and attorney's fees incurred in obtaining title to the garage.

BONYM contends that because Hoy has freely used the garage since purchasing the condo, Hoy has suffered no damages. This argument unfairly ignores Hoy's damages

incurred in perfecting title to the garage, which we note might not be completed yet. Hoy was justified, and required, to aggressively bring an action to perfect title to the garage unit BONYM sold her. She is entitled to compensation for these efforts—particularly in light of BONYM's failure to adduce the serious title issue. We reverse the district court's summary judgment dismissal of Hoy's claim for damages and remand for a determination of Hoy's damages related to clearing the title. In doing so, the court should, in the interest of finality, require BONYM to provide any conveyance which would customarily be required to fulfill its obligation to provide marketable title, including, if necessary, the warranty deed required in the purchase agreement.

Hoy also contends that she suffered damages in taking her condominium off the market when she realized she did not own the garage. But, speculative, remote, or conjectural damages are not recoverable. *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977). Hoy has, as yet, provided no evidence that she could have sold the condominium but for the imperfect title, that someone withdrew a purchase offer because of the imperfect title or that she has suffered a market related loss. As a result, the district court properly dismissed these damages as speculative.

V. Mitigation of damages

The district court found that Hoy's costs in perfecting title "were unnecessary as she could have simply contacted [BONYM] or . . . Niemela. Instead, she filed suit." The court oversimplifies this issue. "Whether damages are subject to mitigation is a question of law we review de novo." *DeRosier v. Util. Sys. of Am., Inc.*, 780 N.W.2d 1, 6 (Minn. App. 2010).

It is the duty of the person damaged, in a breach of contract to purchase property, to minimize damages. *See Frank*, 303 Minn. at 96, 226 N.W.2d at 746; *see also Costello v. Johnson*, 265 Minn. 204, 208, 121 N.W.2d 70, 74 (1963). However, the breaching party bears the burden of demonstrating that the damages incurred were or could have been mitigated by reasonable diligence. *Lanesboro Produce & Hatchery Co. v. Forthun*, 218 Minn. 377, 381, 16 N.W.2d 326, 328 (1944).

BONYM argues that Hoy should have simply contacted BONYM's real estate agent or the attorney who foreclosed the Niemela mortgage prior to commencing suit. Under these facts it was certainly reasonable for Hoy to have separate counsel to represent her in obtaining title to the garage unit. At a minimum the fees and costs necessary to research the title issues, file the initial tax lien and preserve Hoy's interest seem justified. However, whether it was also necessary to bring this lawsuit is a fact question. A phone call might have been successful and it might not have. It is for the finder of fact to decide, considering the need to protect Hoy's interests and any inherent conflicts

VI. Benefit of the bargain (BONYM)

Hoy contends that she was not afforded the benefit of her bargain with BONYM because BONYM failed to convey title to the garage which she purchased. "In this state we do not subscribe to the 'benefit-of-the-bargain' rule which allows the plaintiff to recover the difference between the value of the property received and the value to plaintiff that the property would have had if the representation had been true." *B.F.*

Goodrich Co. v. Mesabi Tire Co., Inc., 430 N.W.2d 180, 182 (Minn. 1988). Since no evidence on this issue was provided, the district court properly dismissed Hoy's claim.

VII. Attorney's fees

Hoy alleges that she should be reimbursed her attorney's fees, costs, and expenses. The district court denied this claim. "We will not reverse the district court's decision on attorney fees absent an abuse of discretion." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

Attorney's fees are recoverable only in the case of an authorizing contract or statute. *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981). The standard form purchase agreement between BONYM and Hoy states that "[i]n any action . . . arising out of, brought under, or relating to the terms or enforceability of the Agreement the prevailing Party shall be entitled to recover from the losing Party all reasonable attorney's fees, costs, and expenses incurred in such action." The district court determined that BONYM was the "prevailing party" and denied attorney's fees to Hoy. Because we hold that BONYM breached its contract, we reverse and remand to the district court the issue of Hoy's reasonable attorney's fees and costs and to determine if Hoy is the "prevailing party" consistent with our discussion above concerning mitigation of damage.

VIII. Negligent representation (BONYM)

Hoy contends that the district court erred by failing to consider her claim for negligent representation against BONYM. We review this issue de novo. *See Riverview Muir Doran*, 790 N.W.2d at 170.

"An essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information." *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App. 2000) (citation omitted). "But, where adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent misrepresentation." *Id.* (quotation omitted). An arm's length transaction is "[a] transaction between two unrelated and unaffiliated parties." *Black's Law Dictionary* 1635 (9th ed. 2009). Here, Hoy and BONYM negotiated contractually at arm's length when Hoy purchased the condominium from BONYM. As a result, Hoy's negligent-misrepresentation claim fails. The district court's dismissal of this claim was therefore proper.

IX. Unjust enrichment (BONYM)

Hoy contends that the district court erred by failing to consider her claim for unjust enrichment against BONYM. We review this issue de novo. *See Riverview Muir Doran, LLC*, 790 N.W.2d at 170.

"It is well settled in Minnesota that one may not seek a remedy in equity when there is an adequate remedy at law." *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn. 1992). "[E]quitable relief cannot be granted where the rights of the parties are governed by a valid contract." *U.S. Fire Ins. Co. v. Minn. Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981). There is no dispute that there was a valid contract between the parties in the form of the purchase agreement. Hoy's breach-of-contract claim is evidence of such. Hoy has an adequate remedy available at law (her

breach-of-contract remedy), so she may not also pursue equitable relief against BONYM. The district court properly dismissed Hoy's claim.

X. Breach of contract (FATIC)

Hoy contends that the district court erred by finding that FATIC did not breach its contract in failing to alert her to the title defect on her property. The district court dismissed this claim on the ground that Hoy had suffered no damages. "Interpretation of an insurance policy and application of the policy to the facts of a particular case are questions of law reviewed de novo." *Rechtzigel v. Fid. Nat'l Title Ins. Co. of N.Y.*, 748 N.W.2d 312, 316 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

"General principles of contract interpretation apply to insurance policies." *Id.* (quotation omitted). "A breach of contract requires proof of three elements: (1) the formation of a contract; (2) the performance of conditions precedent by the plaintiff; and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assoc., P.A.*, 756 N.W.2d at 918. The contract at issue here is the title insurance policy. The policy provided coverage for loss occasioned when "[s]omeone else owns interest in Your Title." The policy defines "Title" as "ownership of your interest in the land as shown in Schedule A." But, due to the omissions of BONYM and its realtor, Schedule A includes only the legal description of the condominium unit, not the separate garage unit.

Title insurance is intended to protect against loss sustained as a result of defects in title or unmarketability of title. *See Rechtzigel*, 748 N.W.2d at 316. "A marketable title is one that is free from reasonable doubt; one that a prudent person, with full knowledge of all the facts, would be willing to accept." *Mattson Ridge, LLC v. Clear Rock Title,*

LLP, 824 N.W.2d 622, 628 (Minn. 2012) (quotation omitted). The policy's covered risks include when "[s]omeone else owns an interest in Your Title"; in other words, an unmarketable title. However, "the mere fact that title was unmarketable [i]s not a breach of the policy." *Id.* at 631. Furthermore, "[a] title insurer does not guarantee that the covered condition does not exist; the insurer promises only that it will fix the condition once it is discovered." *Id.* (citations omitted).

The policy (Schedule A) includes only the legal description of the property to be insured, condominium unit #101, without reference to the legal description of the separate garage unit also included on the purchase agreement. There was no defect in the condominium unit title. FATIC's policy guaranteed that the covered risk (someone else owning an interest in Hoy's property) did not exist. *See id.* Consequently, FATIC did not breach the terms of its policy, as issued, and the district court properly dismissed Hoy's claim.

XI. Negligence (FATIC)

Hoy finally contends that the district court erred by finding that FATIC was not negligent in failing to alert her to the garage's title defect. The district court dismissed this claim on the ground that Hoy had suffered no damages. We review this issue de novo. *See Riverview Muir Doran, LLC*, 790 N.W.2d at 170.

"To prevail in negligence, a plaintiff must prove as one element that the defendant breached 'some duty imposed by law, not merely one by contract." *D & A Dev. Co. v. Butler*, 357 N.W.2d 156, 158 (Minn. App. 1984), *see Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983) (quotation omitted). Minnesota does not recognize a cause of action

for negligent breach of contract. *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 424 (Minn. 1987). The relationship between FATIC and Hoy is contractual. Hoy concedes this by bringing her breach-of-contract claim against FATIC. As such, Hoy's negligence claim fails as a matter of law, and the district court properly dismissed this claim.

Affirmed in part, reversed in part, and remanded.