STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1875

David L. Stussy, et al.,
Appellants,

vs.

Gabbert and Gabbert Company, LLLP, et al.,
Respondents,

Burnet Realty, Inc. d/b/a Coldwell Banker Burnet, et al.,
Respondents.

Filed September 9, 2008
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CV-07-3340

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Considered and decided by Worke, Presiding Judge; Lansing, Judge; and Muehlberg, Judge.*

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

LANSING, Judge

This appeal centers on a purchase agreement for three units of a common-interest-ownership project in Edina. The district court granted summary judgment dismissing David Stussy's four-count complaint against the project's developers and real-estate broker and denying his motion for partial summary judgment, and Stussy appeals. Because he has failed to establish essential elements of his claims under the Minnesota Common Interest Ownership Act, the Minnesota Prevention of Consumer Fraud Act, and the common-law doctrine of fraud in the inducement, we affirm.

F A C T S

Gabbert and Gabbert Company LLLP (Gabbert) obtained approval from the City of Edina on March 6, 2006, to develop The Westin Edina Galleria Hotel and Residences, an eighteen-story hotel and condominium project. David Stussy, a real estate investor, visited Gabbert's sales office and, on May 4, 2006, entered into formal purchase agreements on behalf of himself and his development company, Stussy Enterprises, (collectively Stussy) to purchase three units from the project's developers. The entities named in the complaint as the project's developers—Gabbert and Gabbert Company, LLLP; Warren Beck; Gabbert & Beck, Inc.; Galleria Condominiums, LLC; and Galleria

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

Hotel, LLC—are referred to collectively as "Gabbert." Coldwell Banker Burnet and its agents, who marketed the units, are referred to as "Burnet."

When Stussy signed the purchase agreements, he tendered $213,178.50 in earnest money against the total purchase price of $3,160,646. At that time Gabbert gave him a set of written materials that included proposed articles of incorporation for the unit owners' association, proposed rules and regulations for the association, a form of declaration, and a disclosure statement. Each of Stussy's purchase agreements provided him the right to cancel within ten days of receipt of the written materials. Four days later Stussy provided evidence of his ability to purchase, which satisfied the financing contingency in each of the purchase agreements. Stussy did not exercise his option to cancel within ten days of receiving the written materials.

Eight weeks later, on July 5, 2006, Stussy's financial situation changed, and Stussy requested that Gabbert and Burnet voluntarily cancel the purchase agreements and return his earnest money. Gabbert refused his request, and Burnet retained the earnest funds in its trust account under the provisions of Minn. Stat. § 82.50 (2006).

Stussy brought this action against Gabbert and Burnet in March 2007, seeking to rescind his purchase agreements for the three units and recoup his earnest money. Stussy asserted claims for violation of the Minnesota Common Interest Ownership Act, violation of the Minnesota Prevention of Consumer Fraud Act, and a common-law claim for fraud in the inducement of the contract. Two factual allegations provide the primary bases for each of Stussy's claims: first, that Gabbert and Burnet failed to disclose a dispute between Gabbert and Barnes & Noble that Stussy contends materially affected the project

and, second, that Gabbert had not recorded a declaration creating a common-interest community at the time Stussy signed the purchase agreement. Gabbert and Burnet acknowledge that the Barnes & Noble dispute was not disclosed, but each contends that it had no legal obligation to disclose the dispute, that the dispute did not affect the project, and that the dispute arose a month after the purchase agreements were signed. Gabbert and Burnet also acknowledge that no declaration had been recorded that created a common-interest community at the time Stussy signed the purchase agreements, but both maintain that this fact has no legal significance in the case.

The dispute between Gabbert and Barnes & Noble related to Barnes & Noble's tenancy in Gabbert's Galleria Shopping Center. Gabbert's hotel and condominium project is located on the east end of the shopping center. Gabbert notified Barnes & Noble of the planned project in November 2005. Barnes & Noble objected to the project based on parking issues and a section of its lease with Gabbert that restricted residential use in the shopping center. In May 2006 Gabbert revised the project to address the objections, but on June 9, 2006, Barnes & Noble sought injunctive relief to prevent construction of the project. The district court temporarily enjoined construction on July 12, 2006, but following an evidentiary hearing, denied Barnes and Noble's request for a permanent injunction on construction. The court did impose permanent limitations on parking availability and the location of the project's dog park. We affirmed the district court's order on appeal. *Barnes & Noble Booksellers, Inc. v. Gabbert & Gabbert Co., L.P.*, No. A07-200 (Minn. App. Feb. 12, 2008).

Before the conclusion of the appeal in Gabbert's dispute with Barnes & Noble, Stussy, Gabbert, and Burnet brought cross-motions for summary judgment in this case. The district court granted Gabbert and Burnet's motions for summary judgment on all of Stussy's claims and denied Stussy's motion for partial summary judgment. Stussy now appeals.

D E C I S I O N

The district court granted summary judgment for Gabbert and Burnet on three counts based on its conclusion that Stussy failed to demonstrate a violation of either the Minnesota Common Interest Ownership Act (MCIOA), Minn. Stat. §§ 515B.1-101-.4-118 (2006); or the Minnesota Prevention of Consumer Fraud Act (MPCFA), Minn. Stat. §§ 325F.68-.70 (2006); and thus could not pursue relief or attorneys' fees under these statutes. On the remaining count, the allegation of common-law fraud, the district court concluded that Stussy's claim failed as a matter of law because he presented no evidence that the litigation between Gabbert and Barnes & Noble was material to the transaction between Gabbert and Stussy, and because the facts failed to demonstrate the necessary element of reliance. For the same reasons the district court granted summary judgment against Stussy on the MCIOA, the district court denied Stussy's partial motion for summary judgment that was based on the same provisions. Stussy challenges each determination.

On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788

(Minn. 2005). In assessing the evidence, we take the view most favorable to the party against whom judgment was granted. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 n.1 (Minn. 2003). But if the nonmoving party fails to raise a material issue of fact on any element essential to establishing its case, summary judgment is appropriate. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

I

The primary basis for Stussy's claims under the MCIOA is his assertion that Gabbert violated the act by entering into a purchase agreement with Stussy before it filed a declaration creating a common-interest community. *See* Minn. Stat. § 515B.2-101(a)(1) (stating condominium unit "may be created only by recording a declaration"). According to Stussy's argument, a unit does not exist and may not be sold before a declaration is filed. We agree with the district court's conclusion that this argument misinterprets the MCIOA.

The MCIOA requires that significant construction take place before units are conveyed. *See* Minn. Stat. § 515B.2-101(c) (permitting recording of declaration that creates common-interest community only when all structural components and mechanical systems are substantially completed); *see also* Unif. Common Interest Ownership Act § 2-101 cmt. 5, 7 U.L.A. 880 (2005) (stating that "substantial completion must be reached before a unit may be conveyed"). "The purpose of imposing these requirements is to [e]nsure that a purchaser will in fact take title to a unit which may be used for its intended purpose." Unif. Common Interest Ownership Act § 2-101 cmt. 5, 7 U.L.A. 880.

But the restrictions on the ultimate conveyance of a common-interest-ownership unit do not preclude developers from offering for sale units that are not yet built. The MCIOA specifically anticipates that developers, as persons acting in concert, may "have offered prior to creation of the common-interest community to transfer their interest in a unit *to be created* and not previously transferred." Minn. Stat. § 515B.1-103(15) (emphasis added). We therefore reject Stussy's argument that a unit may not be offered for sale prior to recording a declaration.

Stussy's second argument under the MCIOA is that Gabbert and Burnet violated mandated disclosure provisions. Under the MCIOA, Gabbert, as a declarant, must deliver a disclosure statement to a purchaser. Minn. Stat. § 515B.4-101(b); *see also* Minn. Stat. § 515B.1-103(15)(ii) (defining declarant to include those "who have offered prior to creation of the common-interest community to transfer their interest in a unit to be created and not previously transferred"). A disclosure statement must include "lawsuits to which the association is a party, and the status of those lawsuits which are material to the common-interest community or the unit being purchased." Minn. Stat. § 515B.4-102(a)(13). After delivery of a disclosure statement, any material changes, such as a lawsuit being filed against the association, must also be disclosed. Minn. Stat. § 515B.4-101(b) (requiring material amendments to disclosure statement before conveyance). Stussy relies on these provisions for his argument that Gabbert and Burnet violated the MCIOA disclosure provision.

At the outset, we note that the provision requires disclosure of lawsuits to which the *association* is a party. An association is defined as the "unit owners' association."

Minn. Stat. § 515B.1-103(4). "The membership of the association at all times consists exclusively of all unit owners." Minn. Stat. § 515B.3-101. An association must "be incorporated no later than the date the common-interest community is created." *Id.* No association had been incorporated at the time Barnes & Noble sued Gabbert. The lawsuit involved Gabbert, the developer, but not a unit owners' association.

The purpose for requiring disclosure of lawsuits to which an association is a party is evident because purchasers of common-interest-community units are also accepting a share of the obligations of a unit owners' association. *See* Unif. Common Interest Ownership Act § 4-103 cmt. 1, 7 U.L.A. 976 (2005) (stating that lengthy list of disclosures is required to protect purchaser of common-interest-community unit because of "complex nature of the bundle of rights and obligations which each unit owner obtains"). Expenses resulting from a lawsuit could require assessments on unit owners. *See* Minn. Stat. § 515B.3-115 (authorizing association to assess units for common expenses); Minn. Stat. § 515B.3-115(f) (indicating that judgment lien against association may be levied against all units in common-interest community at time judgment entered). Stussy faced no potential liability based on Gabbert's litigation with Barnes & Noble, and the plain language of the disclosure provisions applies only to litigation involving the association, not the developer.

Stussy's final argument under the MCIOA attempts to invoke the act's unconscionability provisions, Minn. Stat. § 515B.1-112. In the specific counts of his eighteen-page complaint, Stussy raises only the issues of offering a unit for sale prior to

recording a declaration and failing to disclose the Barnes & Noble litigation. Neither issue constitutes a violation of the act or provides a basis for an unconscionability claim.

For the first time on appeal, Stussy contends that the financing contingency terms of the purchase agreements are unconscionable. Because Stussy failed to present this argument in his complaint or response to the motion for summary judgment, this issue is waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (restricting appellate issues to those that have been presented and considered by district court).

Stussy has not established a prima facie case for recovery under the MCIOA. The district court therefore properly dismissed Stussy's claims under the MCIOA, including his claim for attorneys' fees under the act.

II

The district court also granted summary judgment on Stussy's claims for damages and attorneys' fees under the MPCFA. *See* Minn. Stat. § 8.31, subd. 3(a) (2006) (authorizing private action for damages and attorneys' fees under the MPCFA). The district court primarily relied on the fact that Stussy failed to present evidence of fraud. The record supports the district court's determination.

Stussy's claims under the MPCFA essentially reiterate his claims under the MCIOA. The section of his complaint alleging MPCFA violations lists Gabbert and Burnet's failure to disclose Gabbert's dispute with Barnes & Noble and the absence of a formal common-interest-community plat. Stussy asserts that this "constitute[d] the act, use, or employment of fraud, false pretense, misrepresentation, misleading statement or deceptive practice with intent that others rely thereon." These allegations fail for the

same reasons that Stussy's claims under the MCIOA fail. Gabbert and Burnet did not have a statutory duty to disclose the litigation with Barnes & Noble because Gabbert and Burnet were, respectively, the developer and the marketing agent—they were not a unit owners' association. And Gabbert and Burnet did not commit fraud by offering for sale condominium units that had not yet been built. On these facts, the district court did not err by dismissing Stussy's claims under MPCFA.

III

The common law fraud-in-the-inducement claim against Gabbert and Burnet is also a reformulation of Stussy's MCIOA claims. Stussy's complaint alleges that Gabbert and Burnet failed to disclose the on-going dispute with Barnes & Noble and that they failed to disclose that the common-interest community and unit owners' association had not been formally created at the time of the purchase agreements. Stussy alleges that he reasonably relied on the material nondisclosure of these facts and was led to believe construction was "imminent."

The district court granted summary judgment on Stussy's first common-law fraud argument because Stussy failed to show that the dispute with Barnes & Noble was material and that no lawsuit had been filed at the time the purchase agreements were signed. Consequently, Stussy failed to present evidence on elements necessary to establish a claim for fraud in the inducement of a contract. *See Vandeputte v. Soderholm*, 298 Minn. 505, 507-08, 216 N.W.2d 144, 146 (1974) (listing elements necessary for fraud-in-the-inducement claim, including materiality of false representation and detrimental reliance).

Stussy acknowledges that Barnes & Noble had not sued Gabbert at the time the purchase agreements were signed but contends that the litigation was imminent. Whether or not the litigation was imminent, Stussy has not demonstrated a basis for an obligation to disclose, the materiality of a failure to disclose, or his detrimental reliance. As the district court observed, the concluded litigation between Gabbert and Barnes & Noble did not in any way affect Stussy's interest in the property.

Stussy's second common-law fraud argument fares no better. He has failed to show detrimental reliance on a material misrepresentation in the MCIOA documents that led him to believe that the units he agreed to purchase had a legal existence. He does not dispute that he signed the agreement to purchase the units knowing that they were to be built in the future, and, under the MCIOA, a developer may offer units for sale prior to recording a declaration. Stussy acknowledges in his complaint that he sought rescission of the purchase agreements because of a change in his financial situation. On this record, Stussy's claims for fraud in the inducement of the contract cannot withstand summary judgment, and the district court's determination is fully supported.

IV

Stussy's final challenge is to the district court's denial of his motion for partial summary judgment. He characterizes this motion as seeking "declaratory relief and supplemental relief rescinding the earnest money contracts and entitling [him] to return of [his] earnest money." His recitation of the basis for the partial summary judgment is essentially the same cluster of facts and legal arguments that he advanced in his unsuccessful attempt to forestall summary judgment on his claims under the MCIOA, the

MPCFA, and his common-law claim for fraud in the inducement of the contract. Because Stussy has failed to establish the existence of elements essential to each of these claims, the district court properly denied Stussy's claim for partial summary judgment.

Affirmed.