STATE OF MINNESOTA
IN COURT OF APPEALS
A10-625

Hager's of Cohasset, Inc., et al.,
Appellants,

vs.

Charles F. Nelson,
Respondent,

Lee Marvin Beer, et al.,
Respondents.

Filed February 15, 2011
Affirmed
Peterson, Judge

Itasca County District Court
File No. 31-CV-08-4080

Brendan R. Tupa, Entrepreneurs & Free Markets, PLC, Minneapolis, Minnesota (for appellants Hager's of Cohasset, Inc. and Stanley M. Hager)

Brian C. Bengtson, Lano, Nelson, O'Toole & Bengtson, LTD., Grand Rapids, Minnesota (for respondent Charles F. Nelson)

Debra M. Newel, David J. McGee, Thomsen & Mybeck, P.A., Bloomington, Minnesota (for respondents Lee Marvin Beer and MN Direct Properties, Inc.)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

PETERSON, Judge

In this appeal from summary judgment in a real-estate-conveyance dispute, appellant-sellers argue that there are genuine issues of material fact regarding (a) the meaning of conditions precedent to the sale and (b) the existence of certain fiduciary duties. We affirm.

FACTS

Appellants Stanley M. Hager and Hager's of Cohasset, Inc. (collectively Hager) owned property at Highway 2 West in Cohasset. Hager operated a fuel-oil business and used this property for storing and selling petroleum products. In October 2007, Hager entered into a listing agreement with respondent real-estate agent Lee M. Beer and respondent-broker MN Direct Properties, Inc. (collectively MN Direct Properties) for the sale of Hager's property, described as parcel B. Hager later divided the parcel into two tracts, A and B. Tract A was sold in 2007.

In April 2008, Beer approached respondent Charles F. Nelson about purchasing tract B. Nelson offered to buy the property for $95,000. On April 28, 2008, Beer drafted a purchase agreement based on Nelson's instructions. The purchase agreement provided that the sale was contingent on Hager giving Nelson a letter from the Minnesota Pollution Control Agency (MPCA) stating that the land is free from any future clean up. Lines 261-263 of the purchase agreement further provided that Hager was to remove all above-ground tanks from the property prior to September 1, 2008. In addition, the purchase agreement gave notice that there was a dual agency arrangement and disclosed that MN

Direct Properties owed fiduciary duties to both Nelson and Hager. After Nelson signed the agreement, it was presented to Hager. Hager rejected the offer because he felt the purchase price was too low, but he proposed a counteroffer of $110,000.

In May 2008, Beer drafted a counteroffer addendum to reflect the higher purchase price. The counteroffer addendum also provided that all other terms and conditions of the April 28, 2008 purchase agreement remain the same except the following:

> Lines 261-263 shall now read Seller to have tanks removed and proper fill removed and new fill in place prior to closing per MPCA rules in place at present time, seller to provide buyer with a completion certificate by the MPCA. Buyer to have no financial obligation for the removal and compliance with MPCA rules and regulations.

On May 9, 2008, Hager and Nelson agreed to the counteroffer addendum and entered into a purchase agreement for the sale of tract B. Closing was scheduled for June 15, 2008.

On May 27, 2008, Hager had the above-ground fuel tanks and fuel pumps removed from tract B. But Hager did not provide Nelson with a completion certificate from the MPCA or any other document indicating that the tanks were removed in compliance with MPCA rules and regulations. Also, Hager never provided Nelson with a letter from the MPCA stating that the land was free from future cleanup. The only letter from the MPCA that Hager provided to Nelson was dated October 25, 2007, which was six months before the parties had entered into the purchase agreement. That letter, which had been issued in conjunction with Hager's negotiations with another potential buyer, addressed a petroleum release that occurred in June 2007, when two 10,000-gallon underground storage tanks were removed from the property. The letter stated that the

MPCA had closed the release-site file because the June 2007 petroleum release had been adequately addressed and did not require any additional investigation or cleanup work at that time. The letter noted that "file closure does not mean that all of the petroleum contamination has been removed from this site" and "that the MPCA reserves the right to reopen this file." In addition, the letter states: "This letter does not release any party from liability for the petroleum contamination . . . . If future development of this property or the surrounding area is planned, it should be assumed that petroleum contamination may be present."

Nelson did not receive this letter until a few days before the scheduled closing, and he did not accept it as satisfying the conditions in the purchase agreement. In late July or early August, Nelson unequivocally informed Beer that he would not be closing. In response, Hager commenced a lawsuit against Nelson, alleging breach of contract and tortious interference with contract and seeking a declaratory judgment construing the terms of the purchase agreement and an order compelling specific performance. Hager also sued MN Direct Properties on claims of fraudulent misrepresentation and breach of fiduciary duty/negligence. Nelson counterclaimed against Hager for return of his $1,000 earnest money, and Nelson and MN Direct Properties moved for summary judgment and dismissal of all of Hager's claims. The district court granted summary judgment on all claims, including Nelson's counterclaim, in favor of Nelson and MN Direct Properties. This appeal followed.

D E C I S I O N

On appeal from a summary judgment, appellate courts review de novo whether a genuine issue of material fact exists and whether the district court erred in applying the law; in doing so, appellate courts view the evidence in the light most favorable to the party against whom summary judgment was granted. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009). To survive a summary-judgment motion, the nonmoving party must present "sufficient evidence to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis Cnty*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted). "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

Breach of contract

"Summary judgment is inappropriate where terms of a contract are at issue and those terms are ambiguous or uncertain." *Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "If, however, terms of the contract may be given their plain and ordinary meaning, construction of the contract is a matter for the court and summary judgment may be appropriate." *Bank Midwest*, 674 N.W.2d at 179. Whether a contract is ambiguous is a question of law reviewed de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

In granting Nelson's summary-judgment motion, the district court determined that the purchase agreement unambiguously required Hager to satisfy certain "conditions precedent" prior to closing. "A condition precedent is an event that must occur before a party is required to perform a certain contractual duty." *Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 299 (Minn. App. 2004). There can be no breach of contract if the event required by the condition precedent does not occur. *Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989).

The purchase agreement and counteroffer addendum require that (1) "seller give buyer letter from MPCA stating land is free from any future clean up" and (2) "seller to provide buyer with a completion certificate by the MPCA." Hager argues that the language concerning the first requirement is ambiguous because "neither Respondents nor Appellants knew what type of letter would satisfy such a condition." We disagree. The purchase agreement unambiguously requires a letter from the MPCA that states that the land is free from any future cleanup. Because the purchase agreement unambiguously describes the information that the letter must contain, the possibility that there could be different types of letters that contain the information does not make the purchase agreement ambiguous.

The district court concluded that the October 25, 2007 letter did not satisfy the minimum requirements of the condition because it predates the purchase agreement, releases no party from liability, and indicates that it should be assumed that petroleum contamination may be present. The district court also noted that there is no genuine dispute regarding Hager's failure to satisfy the completion-certificate condition. Hager

cites nothing in the record that shows otherwise or that creates a genuine fact issue on this point. Hager acknowledged in his deposition that he never provided Nelson with a completion certificate from the MPCA, and the record shows that Hager did not provide Nelson with any documentation from the MPCA related to the tank removal in May 2008. Because Hager never provided Nelson with the required letter from the MPCA or a completion certificate from the MPCA, the conditions precedent were not satisfied, and Nelson had no obligation to complete the sale. Thus, the district court did not err in granting summary judgment on the breach-of-contract claim

Fiduciary duty

A real-estate agent owes a "duty to communicate to the seller all facts of which [the agent] has knowledge which might affect the principal's rights or interests." *White v. Boucher*, 322 N.W.2d 560, 564 (Minn. 1982) (quotation omitted).

Hager's breach-of-fiduciary-duty claim is not based on Beer's failure to communicate information to Hager. Rather, Hager asserts that Beer breached his fiduciary duty because Beer drafted the purchase agreement per Nelson's instructions without seeking legal advice or additional expertise from the MCPA about the conditions. But Hager has not shown that Beer had a duty to do either of these things. Generally, assignments of error based on mere assertion and not supported by argument or authority are waived unless prejudice is obvious. *State by Humphrey v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). On this record, Hager has failed to

demonstrate the existence of a genuine issue of material fact regarding whether a fiduciary duty was breached.

Affirmed.