STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1922

John Moore,
Appellant,

vs.

Deborah G. Fletcher,
Respondent.

Filed September 5, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-16-7615

John Moore, Minneapolis, Minnesota (pro se appellant)

Susan K. Wiens, The Environmental Law Group, Ltd., Mendota Heights, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

PETERSON, Judge

In this pro se appeal, appellant challenges the district court's dismissal of his action for public nuisance, private nuisance, trespass, tortious interference with prospective economic advantage, and quantum meruit. We affirm.

FACTS

By amended complaint, appellant John Moore alleged the following facts: In November 2013, Moore engaged an asbestos-remediation contractor to remove a boiler and pipe insulation from Moore's mother's home. The work required the contractor to "walk right up against the opposing building," which was owned by respondent Deborah G. Fletcher. While the project was underway, Moore saw a worker "carrying large chunks of cast iron" to a truck without any wrapping, asked the worker if it should be wrapped, and was told that a substance on the cast iron "was 'just oil.'" When Moore went to inspect, he discovered "chunks of oily, fibrous debris laid outside the containment along the path to the truck," thought the debris seemed to be "cellulose insulation like what he had sampled himself from one of the pipes, prior to the abatement," and was told that it was "'just dirt.'" Based on their own research, Moore and his mother "discovered that the . . . contractors had been cutting corners" and were "spreading . . . hazardous material around his home," and, as a precautionary measure, he and his mother "ceased operating power equipment on the lawn." Moore notified Fletcher about the "contamination" and asked her "not to operate any lawn care machinery or walk between the houses until the contamination could be cleaned up," which Fletcher initially agreed to do.

In late summer 2014, Moore hired a contractor "to excavate a thin layer of soil from the front yard and along the north side of the walkway." Because the contractor excavated only a "6 inch margin from the walkway" and Moore thought that more remediation work was necessary on Fletcher's property, Moore reminded Fletcher's lawn-care provider "not to operate machinery between the houses."

In the summer of 2015, Moore "went to excavate the soil again," but Fletcher told him "not to come near her house with any digging, citing a concern that there was some jeopardy to her foundation." Fletcher designated an area that Moore could excavate, but because it was not "substantially different" from the area excavated earlier, he "resign[ed] the project."

In spring 2016, Fletcher notified Moore's mother that she would no longer agree to refrain from operating machinery between the properties, and Moore's mother spotted Fletcher "in the area in question, pulling weeds and shaking off the soil therefrom, likely spreading what contamination remain[ed] from the abatement." Moore then initiated this action against Fletcher pro se, alleging claims of public nuisance, private nuisance, trespass, tortious interference with prospective economic advantage, and quantum meruit.

Fletcher moved to dismiss for failure to state a claim and failure to join an indispensable party. Following a hearing, the district court granted Fletcher's motion. The district court ruled that Moore lacked standing to raise the public-nuisance claim, failed to allege actions constituting a private nuisance, did not plead a sufficient possessory interest in the property to maintain a trespass action and otherwise failed to allege a prima facie case of trespass, failed to allege a third-party relationship as required for the tortious-interference claim, and did not allege an agreement or acceptance of a benefit to support a claim of quantum meruit. During the hearing, the district court also excluded affidavits as outside the record. In this appeal, Moore argues that the district court erred in dismissing his complaint for failure to state a claim and abused its discretion by refusing to permit him to amend his complaint.

D E C I S I O N

I.

Under Minn. R. Civ. P. 12.02(e), a party may, by motion, assert the defense of "failure to state a claim upon which relief can be granted." "When reviewing a dismissal for failure to state a claim upon which relief can be granted, an appellate court must only determine whether the complaint sets forth a legally sufficient claim for relief." *Stead-Bowers v. Langley*, 636 N.W.2d 334, 338 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). "The standard of review is therefore de novo." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Dismissal for failure to state a claim is not permitted "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (quotation omitted). "The facts set forth in the complaint must be accepted as true, and the plaintiff is entitled to have the benefit of all favorable and reasonable inferences." *Stead-Bowers*, 636 N.W.2d at 338.

Public nuisance

Moore alleges that Fletcher's activity of "disturbing the area" constitutes a public nuisance because "[w]hat contamination was left behind on [Fletcher]'s property continues to present a risk to the public." A person who "maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public" is guilty of maintaining a public nuisance. Minn. Stat. § 609.74(1) (2016). A private person typically does not have the right to assert a claim of public nuisance; rather, "[t]he public wrong must be redressed by

a prosecution in the name of the state." *Hill v. Stokely-Van Camp, Inc.*, 260 Minn. 315, 320-21, 109 N.W.2d 749, 753 (1961) (quotation omitted). But a private person may bring a cause of action for public nuisance if "the plaintiff has suffered some special or peculiar damage not common to the general public, and in such cases only." *Id.* at 321, 109 N.W.2d at 753 (quotation omitted); *see also North Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 189 (Minn. App. 1984) (noting requirement of allegation of "special or peculiar damage not common to the general public" in order to bring private action for relief from public nuisance (quotation omitted)), *review denied* (Minn. Jan. 2, 1985). Because Moore has not alleged that Fletcher caused him to suffer a special or peculiar damage that was not common to the general public, he has failed to set forth a legally sufficient public-nuisance claim.

Private nuisance

Moore alleges a claim of private nuisance based on the premise that "[w]hat contamination remains on [Fletcher]'s property has been [and continues to be] spread onto [Moore]'s property" and interferes with his ability to enjoy the property, and he has borne the "expense of remediation." The private-nuisance statute provides:

> Anything 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, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Minn. Stat. § 561.01 (2016).

The district court determined that Moore failed to allege any activity on Fletcher's part that amounts to a nuisance. We agree. A private nuisance requires interference with another's use of property. *See Uland v. City of Winsted*, 570 F. Supp. 2d 1114, 1120 (D. Minn. 2008) (stating that nuisance occurs "where a defendant intentionally interferes with the plaintiff's right to use and enjoy the property"). "[T]here must be some kind of conduct causing the nuisance harm which is 'wrongful.' This wrongful conduct varies, and may at times be characterized as intentional conduct, negligence, ultrahazardous activity, violation of a statute or some other tortious activity." *Highview N. Apts. v. Ramsey County*, 323 N.W.2d 65, 70-71 (Minn. 1982) (citation omitted). Moore's amended complaint alleges no conduct that amounts to a nuisance. As the district court stated, "That Moore's mother observed Fletcher pulling weeds and shaking off dirt a year and a half after the alleged contamination is too remote, too speculative, and too isolated to support a cause of action for nuisance."

Trespass

"Trespass encompasses any unlawful interference with one's person, property, or rights, and requires only two essential elements: 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) (quotation omitted), *review denied* (Minn. Aug. 5, 2003).

Moore has not claimed a legal interest in his mother's property, although the record suggests that he lives with his mother. He also has not claimed an unlawful entry onto the property. "[T]respass is an invasion of the plaintiff's right to exercise exclusive possession

of the land and nuisance is an interference with the plaintiff's use and enjoyment of the land." *Fagerlie v. City of Willmar*, 435 N.W.2d 641, 644 n.2 (Minn. App. 1989); *see Johnson v. Paynesville Farmers Union Coop Oil Co.*, 817 N.W.2d 693, 701 (Minn. 2012) (stating that unlawful entry "must be done by means of some physical, tangible agency in order to constitute a trespass" (quotation omitted)). Moore alleged that Fletcher "spread[] what contamination remains on [her] property onto [his] property," but the only facts he alleged in support of this allegation are that Fletcher had lawn-care service in the area and pulled and shook weeds, "likely spreading" remaining contaminants from the asbestos. The alleged facts are insufficient to show an unlawful entry for purposes of asserting a trespass claim.

Tortious interference with prospective economic advantage

Moore argues that Fletcher tortiously interfered with his prospective economic advantage by deterring visits to his mother's home by potential private music students. The district court ruled that this claim is legally insufficient because Moore failed to identify a third party with whom he had a "reasonable probability of a future economic relationship," which is an element of the claim. *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 221 (Minn. 2014). In *Gieseke*, the supreme court first recognized the cause of action and set forth its elements, as follows:

> 1) The existence of a reasonable expectation of economic advantage;
> 2) Defendant's knowledge of that expectation of economic advantage;
> 3) That defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation;

4) That in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and
5) That plaintiff sustained damages.

Id. at 219.

To demonstrate the first element, "a plaintiff must specifically identify a third party with whom the plaintiff had a reasonable probability of a future economic relationship." *Id.* at 220-21. "[A] plaintiff's projection of future business with unidentified customers, without more, is insufficient as a matter of law." *Id.* at 221-22.

Moore failed to identify any music student with whom he likely had a future economic relationship. Moore also failed to allege facts that would establish that Fletcher intentionally interfered with any reasonable expectation of economic advantage. Fletcher's alleged conduct of pulling weeds and mowing her lawn does not demonstrate any interference with Moore's business relationship with potential music students, much less the wrongful or intentional interference contemplated by this tort. *See id.* at 218-19 (requiring a showing that "the interference is intentional and independently tortious or unlawful, rather than merely unfair").

Quantum meruit

Quantum meruit is applied "only when failure to do so would result in unjust enrichment." *Stemmer v. Estate of Sarazin*, 362 N.W.2d 406, 408 (Minn. App. 1985).

> The elements of an unjust enrichment claim are: (1) a benefit conferred; (2) the defendant's appreciation and knowing acceptance of the benefit; and (3) the defendant's acceptance and retention of the benefit under such circumstances that it would be inequitable for him to retain it without paying for it. A claim for unjust enrichment does not "lie simply because one party benefits from the efforts or obligations of others, but

> instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully."

Dahl v. R.J. Reynolds Tobacco Co., 742 N.W.2d 186, 195-96 (Minn. App. 2007), *review denied* (Minn. Jan. 20, 2009) (citation omitted) (quoting *First Nat'l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981)).

Without commenting on whether Fletcher received a benefit or whether accepting a benefit would have been inequitable, the district court ruled that Moore failed to show that Fletcher knowingly accepted a benefit. The amended complaint alleges that Fletcher objected to Moore's remediation work, told him that she was not "concerned about . . . asbestos," and eventually told him "not to come near her house." These allegations do not show that Fletcher knowingly accepted a benefit, and, therefore, are inadequate to establish grounds for an award in quantum meruit.

II.

Moore argues that the district court abused its discretion by refusing to allow him to amend his complaint to cure deficiencies. The district court record does not include a motion by Moore to amend his complaint. The record shows that Moore filed two affidavits, signed by himself and his mother, on July 30, 2016. Most of the statements in the affidavits do not correct deficiencies in Moore's complaint, with the exception of Moore's mother's statement in her affidavit that, under a 2008 oral lease, Moore has the right to "possess, use, and enjoy" her property. At the August 8, 2016 hearing on Fletcher's motion to dismiss, the district court told Moore that "[t]he record is closed with regard to facts. It's just what's in your Complaint, no more, . . . no less." The district court also

noted that the existence and terms of the purported lease agreement between Moore and his mother were "not in the record."

After a motion is made to dismiss for failure to state a claim upon which relief can be granted, Minn. R. Civ. P. 12.02 contemplates that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." The district court record does not show that Moore moved to amend his complaint or to supplement the record, and Moore apparently filed the affidavits just over a week before the hearing on the motion to dismiss. Under these circumstances, the district court did not err by limiting the scope and record of the hearing to the pending motion to dismiss. *See Tierney v. Arrowhead Concrete Works, Inc.*, 791 N.W.2d 540, 543 (Minn. App. 2010) (ruling that, when case was dismissed for failure to state a claim even though plaintiff submitted affidavits of two expert witnesses, district court's ruling on dismissal motion without considering affidavits "implicitly excluded" affidavits, and only question before appellate court was whether complaint set forth legally sufficient claim for relief), *review denied* (Minn. Feb. 15, 2011); *Brendsel v. Wright*, 301 Minn. 175, 178, 221 N.W.2d 695, 696-97 (1974) (stating that district court has discretion to allow amendment to pleadings, and that prejudice to other party is "[a]n important consideration"). The district court did not abuse its discretion by declining to allow Moore to amend his complaint.

Affirmed.