STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1955

BPG Grand Oak Building Retail Investors, LLC,
Respondent,

vs.

Webster Jacob, LLC, et al.,
Appellants,

Roger R. Hatzenbuehler, et al.,
Defendants.

Filed June 26, 2017
Affirmed
Kirk, Judge

Dakota County District Court
File No. 19HA-CV-15-2899

Christopher L. Lynch, Christopher J. Knapp, Barnes & Thornburg LLP, Minneapolis, Minnesota (for respondent)

Ronald J. Walsh, Walsh Law, Bloomington, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellants tenant and guarantor challenge the district court's grant of summary judgment in favor of respondent commercial landlord on its breach-of-lease and breach-of-guaranty claims, arguing that the court erred in finding that respondent owed no duty to

disclose to appellants the highway construction that was planned near the leased premises. Appellants also challenge the court's construction of guarantor liability. We affirm.

FACTS

On September 27, 2013, appellant tenant Webster Jacob, LLC (Webster Jacob) entered into a retail lease agreement with respondent landlord BPG Grand Oak Building Retail Investors, LLC (BPG) for the purpose of opening a restaurant in Eagan (leased premises). The parties executed amendments to the lease on January 15, 2014 and December 15, 2014, the first of which added a joint guaranty. Appellant guarantor Ronald Jacob (Jacob) agreed to be jointly and severally liable with co-guarantors Roger Hatzenbuehler and Patrick Trepanier for Webster Jacob's obligations under the lease.[1] The restaurant fully opened for business in May 2014. From June 2014 to October 2014, construction took place on the highways near the leased premises, impacting access to the restaurant. Webster Jacob stopped paying rent for the leased premises in September 2014. In June 2015, BPG filed a successful eviction action against Webster Jacob and regained possession of the leased premises. On August 17, 2015, BPG filed a breach-of-lease action against Webster Jacob and a breach-of-guaranty action against Jacob and his co-guarantors. Webster Jacob and Jacob (collectively appellants) counterclaimed, arguing that BPG knew about the planned highway construction prior to signing the lease and had a duty to disclose

[1] Section six of the guaranty provided that the guarantors "shall be jointly and severally liable" and for such purposes, the word guarantor "shall be construed to refer to each of the undersigned parties separately." Section seven stated that the "maximum liability under this [g]uaranty with respect to each [g]uarantor shall be [$110,000], plus any costs, including reasonable attorneys' fees, incurred to enforce this [g]uaranty."

that information to appellants because it impacted the suitability of the leased premises for its intended use as a restaurant.

In the March 29, 2016 order for judgment, the district court found that BPG owed no duty to disclose to appellants and that no genuine issues of material fact remained as to appellants' breach—Webster Jacob defaulted on the rent and the guarantors were liable as a result. The district court granted summary judgment against appellants and dismissed their counterclaims as a matter of law.[2] Judgment was entered against Webster Jacob for the outstanding rent and related costs, and against Jacob and Hatzenbuehler jointly and severally "in an amount up to $110,000, plus attorney's fees and costs incurred enforcing the [g]uaranty."[3] Because BPG asserted a claim within one year of the February 28, 2014 commencement date, under section seven of the guaranty, the maximum amount of liability was $110,000. Subsequently, BPG successfully moved the district court to reconsider its construction of individual guarantor liability, and on June 3, 2016, the court entered an amended judgment against Jacob individually, "in an amount up to $110,000, plus attorney's fees and costs incurred enforcing the [g]uaranty."[4] Appellants filed two previous appeals in this matter that were dismissed by this court. Final judgment dismissing the claims against Jacob's co-guarantors was entered on October 11, 2016. This appeal follows.

---

[2] The district court properly treated respondent's motion to dismiss appellants' counterclaims and affirmative defenses as a motion for summary judgment, as the court considered information outside the pleadings. Minn. R. Civ. P. 12.02.

[3] Per stipulation, the district court dismissed the claims against Trepanier on December 22, 2015.

[4] A stipulation for dismissal of the claims against Hatzenbuehler was filed on May 9, 2016.

D E C I S I O N

I. The district court properly applied the law when it found that BPG owed no duty to Webster Jacob to disclose a condition outside the leased premises.

This court reviews the district court's legal conclusions on summary judgment de novo, viewing the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). "In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

The existence of a legal duty is generally a question of law for the court to determine. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985). In Minnesota, one party to a transaction generally has no duty to disclose material facts to another party absent special circumstances. *Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014); *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). Minnesota courts have been "reluctant to impose a duty to disclose material facts in arm's-length business transactions between commercial entities." *Driscoll v. Standard Hardware, Inc.*, 785 N.W.2d 805, 813 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). The Minnesota Supreme Court has articulated three special circumstances where a duty to disclose may arise: (1) a person who "speaks must say enough to prevent his words from misleading the other party"; (2) a person "who has special knowledge of material facts to which the other party does not have access may have a duty to disclose th[o]se facts to the other party"; and (3) a person "who

stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts." *Klein*, 293 Minn. at 421, 196 N.W.2d at 622.

Here, appellants concede that the three special circumstances articulated in *Klein* are not present. This was an arms-length commercial transaction between two sophisticated business entities represented by commercial real estate brokers. And the evidence in the record supports the conclusion that respondent had no special knowledge that was not also available to the public.[5] But appellants argue that the *Klein* factors are not exclusive and that, under *Vermes*, a landlord has a "basic" duty to provide enough information to a prospective commercial tenant so that the tenant is able to assess the suitability of a location for its particular business use. *Vermes v. Am. Dist. Tel. Co.*, 312 Minn. 33, 40-41, 251 N.W.2d 101, 105 (1977). This court need not decide whether the "basic" duty in *Vermes* supplements *Klein* or falls within the existing special knowledge prong, because the case at hand is distinguishable from *Vermes*. The tenant in *Vermes* leased the premises for use as a jewelry store, and the landlord failed to sufficiently inform the tenant about the thin ceiling located above the spot intended for the store's vault, which ultimately allowed burglars to enter the vault from above. *Id.* at 35-36, 251 N.W.2d at 102. The *Vermes* court found that the greater physical security required by a jewelry store is a "peculiar" need, and thus the lease's exculpatory clause could not absolve the landlord of liability for failing to disclose the nonobvious feature. *Id.* at 40-41, 251 N.W.2d at 105. The court explained:

[5] Information about all current construction projects on Minnesota highways is available on the Minnesota Department of Transportation's (MNDOT) website, including a search engine to select a project by specific highway.

> A commercial tenant will often have specific needs peculiar to his business which will require the premises to be leased to have certain attributes. . . . In cases where suitability factors might not be obvious upon casual inspection, as with ineffective air conditioning if the premises were inspected in winter, it would be a basic duty of the landlord to inform the prospective tenant of any qualities of the premises which might reasonably be undesirable from the tenant's point of view.

Id.

Here, it is undisputed that a casual inspection of the leased premises would not have revealed the planned highway construction. But unlike in *Vermes*, the planned highway construction was outside the leased premises and not a condition of, on, or within the leased premises. The nearby highway construction was a condition of an adjacent area not under the landlord's control and did not make the actual property unsuitable for appellants' intended use as a restaurant. The court in *Vermes* found a duty to disclose by the landlord because a nonobvious physical attribute of the property itself made it unsuitable for the tenant's particular use and was undiscoverable by the tenant through casual inspection. While it is reasonably foreseeable that road construction adjacent to a commercial property may affect access, BPG had no control over the timing, length, or extent of the nearby highway construction. BPG was not a guarantor to Webster Jacob that construction would never take place nearby. *See Gunhus, Grinnell v. Engelstad*, 413 N.W.2d 148, 152 (Minn. App. 1987) (finding that a commercial lease was not unconscionable when a landlord did not, and could not, misrepresent that a property's utilities or taxes would never increase because such expenses were not within the landlord's control and because the tenant was an experienced businessman and could not have justifiably relied on such a representation), *review denied* (Minn. Nov. 24, 1987).

We decline to conclude that reasonable access is a "peculiar" business need of a restaurant. Nearly all brick-and-mortar businesses require reasonable access. And road construction is a fact of life in Minnesota. BPG had no knowledge of the planned highway construction prior to signing the lease that was not also available to the public.[6] Additionally, as an experienced restaurateur for over 30 years, Jacob knew the importance of reasonable access, and he, or his commercial real estate agent, should have done their due diligence by verifying whether any road construction projects were planned nearby. *See Krueger v. Farrant*, 29 Minn. 385, 388, 13 N.W. 158, 159-60 (1882) ("The tenant is the party most interested in understanding the risks which he will assume in exposing his goods to injury from the elements. It is incumbent on him to exercise proper care and precaution in the selection and leasing of tenements to be occupied by him."). There are no genuine issues of material fact here that present an exception to the general rule that there is no duty to disclose material facts in an arms-length commercial transaction. Neither *Klein*, *Vermes*, nor Minnesota law imposed a duty on BPG to disclose public facts about conditions adjacent to the leased premises not under BPG's control.

II. We decline to address appellants' challenge to the construction of individual guarantor liability.

Appellants also challenge the district court's interpretation of Jacob's individual guarantor liability in the June 3, 2016 amended judgment. The court found that the "clear and unambiguous" language of the guaranty obligated Jacob to pay up to $110,000, plus

[6] BPG does not dispute that it first received notice of the planned highway construction in a November 9, 2012 letter from the City of Eagan, but that letter merely described the project and related noise study; it did not specify a start date or provide further details. Other correspondence received by BPG, if at all, was sent after the lease was signed.

attorney fees and costs. Appellants claim that the guaranty was "ambiguous" and that "genuine issues of fact" remain, but they failed to offer support from the record or law. We decline to reach this issue in the absence of adequate briefing. S*tate, Dep't of Labor and Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997); *see Ganguli v. Univ. of Minnesota*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address issues unsupported by legal analysis or citation).

Affirmed.