STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0216

North Star Mutual Insurance Company,
Appellant,

vs.

Al Juan Huang,
Defendant,

Chinatown Express, Inc.,
Respondent.

Filed September 5, 2017
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Nicollet County District Court
File No. 52-CV-16-426

Mark J. Peschel, Johnson & Lindberg, P.A., Minneapolis, Minnesota (for appellant)

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Considered and decided by Hooten, Presiding Judge; Bratvold, Judge; and Smith, John, Judge.*

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

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

HOOTEN, Judge

In this subrogation action by appellant insurer of a commercial landlord against respondent tenant, appellant challenges the grant of summary judgment to respondent, arguing that respondent is not a third-party beneficiary under the lease and collateral estoppel precludes respondent from re-litigating liability. We affirm in part, reverse in part, and remand.

FACTS

This is a subrogation dispute arising out of a January 2014 flood in the restaurant Chinatown Express (the restaurant). The restaurant was located in a building owned by Gregory and Jan Seitzer, and occupied space leased by the Seitzers to Al Juan Huang. Neither the Seitzers nor Huang are parties to this appeal. Appellant North Star Mutual Insurance Company (NSMI) is the property insurer of the Seitzers. Respondent Chinatown Express, Inc. (Chinatown), is a Minnesota corporation owned by Huang, which operated the restaurant.

The lease between the Seitzers and Huang contains two paragraphs at issue in this appeal. The first is an insurance provision, which states that the "Lessor may, at Lessor's sole option, elect to keep hazard insurance and public liability insurance on the subject property . . . and Lessee agrees to reimburse, in full, Lessor for such insurance costs as 'Additional Rent.'" The parties do not dispute that the Seitzers elected to maintain the insurance on the building and that Huang paid his share of the costs of this policy as additional rent. The second paragraph of the lease implicated in this appeal is a mutual

subrogation waiver, which provides that "[t]he Lessor and the Lessee hereby mutually waive as against each other any claim or cause of action for any loss, cost, damage or expense" resulting from any incident covered by the building insurance policy.

The flood in the restaurant caused approximately $47,070 in damages. NSMI paid the Seitzers approximately $36,280 for repairs. The Seitzers sued Huang in Nicollet County Conciliation Court in May 2015 for approximately $9,790 in unreimbursed damages. The conciliation court ruled in favor of the Seitzers, finding it "more likely than not" that the damage was caused by the negligence of Huang or one of his employees.

In April 2016, NSMI sued Huang and Chinatown in a subrogation action to recover the $37,280 it paid to the Seitzers.[1] Huang and Chinatown moved for summary judgment, arguing that the mutual subrogation waiver in the lease operated to foreclose any recovery by NSMI in a subrogation action. NSMI also moved for partial summary judgment, arguing that, based on the conciliation court's findings in the previous action, Huang and Chinatown were collaterally estopped from relitigating liability for the damages caused by the flood. The district court granted Huang's and Chinatown's motion for summary judgment and denied NSMI's motion for partial summary judgment. NSMI now appeals with respect to respondent Chinatown only.

[1] There is a discrepancy of $1,000 between the complaint, which claims approximately $37,280 was paid to the Seitzers, and the proof of payments presented by NSMI, which show approximately $36,280 in payments.

D E C I S I O N

I.

As a threshold matter, Chinatown asks this court to consider the undisputed fact that Chinatown was incorporated after the date of the flood, and therefore cannot be liable for the claimed loss. NSMI argues that Chinatown forfeited this argument by not making it below.

Generally, "appellate courts will not consider questions which were not presented to or decided by the district court." *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997). As Chinatown did not present this question below, we decline to address it here. On remand, however, the district court may consider what effect, if any, Chinatown's date of incorporation has on Chinatown's liability.

II.

NSMI argues that the district court erred in granting Chinatown's motion for summary judgment because the district court based its decision on facts that are in dispute and not in the record. We agree.

Summary judgment is appropriate when the pleadings and other evidence "show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On review of a district court's summary judgment decision, appellate courts ask two questions: "(1) whether there are any genuine issues of material fact for trial; and (2) whether the [district] court erred in its application of the law." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995). Appellate courts "must view 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).

Generally, "as a matter of subrogation law, an insurer merely steps into the shoes of its insured" and therefore has rights no greater than the insured would have. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 13 (Minn. 2012). In the case of "subrogation claims in the landlord-tenant context . . . courts determine the availability of subrogation based on the reasonable expectations of the parties under the facts of each case." *Id*. at 11–12. The goal of this case-by-case analysis is "to ascertain the expectations of the parties as to which party bears responsibility for a particular loss." *Id*. at 14. This analysis begins with the lease:

> [I]f the lease indicates that the landlord has agreed to procure insurance covering a particular loss, a court may properly conclude that . . . the landlord and tenant reasonably expected that the landlord would look only to the policy, and not to the tenant, for compensation for losses covered by the policy.

Id. at 15 (quotations omitted).

Here, the Seitzers, at their sole option, chose to maintain hazard insurance with NSMI that covered damages incurred in the flood. Further, the Seitzers and Huang agreed to a mutual subrogation waiver that denies the Seitzers, and NSMI as the party standing in the Seitzers' place, any cause of action against Huang for the flood damages covered by the policy. It is clear from the lease that the reasonable expectation of Huang and the Seitzers was that the Seitzers would look only to the policy, and not Huang, for compensation for the flood damages covered by the NSMI policy.

However, NSMI argues that because Chinatown is not the named lessee, and the lease is silent as to Huang's proposed use of the leased space, Chinatown is only an incidental beneficiary of the lease, and cannot enforce the lease provisions. The district court granted Chinatown's motion for summary judgment because it determined that, despite Chinatown not being named in the lease, the lease's mutual waiver of subrogation operated in Chinatown's favor because "[i]t is appropriate to regard Chinatown as a third party beneficiary to the lease."

Generally, "strangers to a contract acquire no rights under the contract." *Wurm v. John Deere Leasing Co.*, 405 N.W.2d 484, 486 (Minn. App. 1987). "Unless the contract expresses some intent by the parties to benefit a third party through contractual performance, a beneficiary is no more than an incidental beneficiary and cannot enforce the contract." *Id*. But, a third party beneficiary "may enforce a promise made for his benefit even though he is a stranger both to the contract and the consideration." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012) (quotation omitted).

In determining whether Chinatown is an incidental beneficiary or a third party beneficiary of the lease, we must determine "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id*. (quoting Restatement (Second) of Contracts § 302 (1981)). To determine the parties' intent, we first look to the language of their contract. *Id*. If the contract is ambiguous, we may resort to extrinsic evidence to determine the parties' intent. *Kilcher v. Dale*, 784 N.W.2d 866, 871 (Minn. App. 2010).

The lease contains language that supports both Chinatown's and NSMI's positions, rendering it ambiguous on this point. In support of Chinatown's position that it is a third party beneficiary, the lease identifies Huang as both the "Lessee" and the "Guarantor" and contains a guarantee clause. The inclusion of a guarantee clause in the lease is evidence that the parties contemplated that Huang would personally answer for the debts of a third party. *See Black's Law Dictionary* 820 (10th ed. 2014) (defining "guarantee clause" as "[a] provision in a contract . . . by which one person promises to pay the obligations of another"). In support of NSMI's position that Chinatown is only an incidental beneficiary, the lease does not identify Chinatown by name, nor does it contain any suggestion that Huang would use the space to open a restaurant. Drawing all inferences in favor of NSMI, it is impossible to conclude that Chinatown is a third party beneficiary from the language of the lease alone.

The district court based its conclusion that Chinatown was a third party beneficiary to the lease on the following extrinsic facts: Chinatown is a closely-held corporation owned and operated by Huang; Chinatown acts through Huang; both parties were aware that the leased premises were being operated as a restaurant by Huang; and the money used to pay the insurance premiums came from the restaurant. However, none of these facts are found in the record. Inexplicably, neither the Seitzers nor Huang were deposed during discovery or filed an affidavit in support or opposition of either party's motion for summary judgment. The only relevant evidence contained in the record is the lease, the insurance policy, and several documents related to the conciliation court case.

None of this evidence describes the ownership interest of Huang in Chinatown or the source of funds used to pay the insurance premiums. Most importantly, evidence of Huang and the Seitzers' knowledge and intent at the time the lease was executed is missing, leaving the determination of their intent an open question of material fact suitable for trial.

In sum, drawing all inferences in favor of NSMI, there is not sufficient evidence to support the district court's determination that Chinatown is a third party beneficiary to the lease as a matter of law. Accordingly, we reverse the district court's grant of summary judgment in favor of Chinatown.

III.

NSMI next argues that the district court erred by denying its motion for partial summary judgment on the sole issue of liability for the flood. We disagree.

NSMI asserts that Chinatown is collaterally estopped from relitigating the issue of liability by the conciliation court's prior determination that the negligence of either Huang or one of Huang's employees caused the flood. "The availability of collateral estoppel is a mixed question of law and fact subject to de novo review." *Pope Cty. Bd. of Comm'rs v. Pryzmus*, 682 N.W.2d 666, 669 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). However, once available, the decision to apply collateral estoppel nevertheless rests within the discretion of the district court. *Id.*

Here, NSMI seeks on the one hand to bind Chinatown to a conciliation court judgment against Huang arising out of a commercial lease, while on the other hand claiming that Chinatown is only an incidental beneficiary of the commercial lease. Based on the limited facts in this record, we cannot define the contours of Chinatown and Huang's

relationship with sufficient precision to draw the conclusions NSMI requests. Therefore, we cannot say that the district court abused its discretion in declining to apply collateral estoppel against Chinatown as to liability for the flood.

Affirmed in part, reversed in part, and remanded.