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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0554

Parkos Construction Company, Inc.,
Appellant,

vs.

Stargate, Inc., d/b/a B & H Petroleum Equipment Company, et al.,
Respondents.

Filed December 18, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-16-11878

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

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

PETERSON, Judge

Appellant challenges the summary-judgment dismissal of its claim for attorney fees and costs under the private-attorney-general statute, Minn. Stat. § 8.31 (2016), arguing that the district court erred by concluding that its claim to recover damages arising out of a

fraudulent bid on a public-works contract by respondent-subcontractor did not meet the statutory public-benefit requirement. We affirm.

FACTS

The parties stipulated to the facts underlying the claims of appellant Parkos Construction Company, Inc. against respondents Stargate, Inc., d/b/a B&H Petroleum Equipment Company; Timothy Kiezula; and Carl Hodgman. In February 2016, the City of Hopkins solicited bids from general contractors for a public-works project. The project included the installation of vehicle lifts, and the project plans required that the lift installer "be certified by the [vehicle lift] manufacturer, for the installation of its lifts."

Parkos, a general contractor, solicited bids from subcontractors for the project. B&H submitted a $69,885.18 bid to install the vehicle lifts. Hodgman prepared the bid for B&H, and Kiezula reviewed it. When B&H submitted the bid, Hodgman and Kiezula knew that B&H was not certified by the vehicle-lift manufacturer.

After receiving B&H's bid, Parkos contacted B&H to confirm the bid, and B&H confirmed its bid. Parkos told B&H that it would include the bid in its general-contractor project bid and then submitted its project bid to the city. The city awarded the project to Parkos. After signing a contract with the city, Parkos learned that B&H could not perform the vehicle-lift installations because B&H was not certified by the vehicle-lift manufacturer.

Parkos sent B&H a letter stating that the lack of certification was causing a major problem with the contract, and B&H responded that it was unable to get recertification and could not perform the vehicle-lift installations. B&H noted that it previously had been

certified by the manufacturer and it had not expected that the recertification would be an issue, but the manufacturer had declined to recertify B&H. Parkos contracted with the second-lowest bidder to perform the vehicle-lift installations and incurred an additional $36,789.82 in project costs.

Parkos brought this action alleging several claims against respondents. The parties stipulated to a $36,789.82 judgment for Parkos on its promissory-estoppel claim against B&H and dismissal of the remaining claims. The only remaining issue was whether Parkos was entitled to recover attorney fees from B&H under the private-attorney-general statute for its claim under the Prevention of Consumer Fraud Act, Minn. Stat. §§ 325F.68-.70 (2016) (consumer-fraud act). The parties filed cross-motions for summary judgment on that issue, and the district court granted summary judgment for respondents. This appeal followed.

DECISION

"[An appellate court] review[s] a district court's summary judgment decision de novo. In doing so, [the appellate court] determine[s] 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). Statutory interpretation presents a question of law, which an appellate court reviews de novo. *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013).

"[A]ny person injured by a violation of [the consumer-fraud act] may bring a civil action and recover damages, together with costs and disbursements, including costs of

investigation and reasonable attorney's fees." Minn. Stat. § 8.31, subd. 3a. The supreme court has held that the private-attorney-general statute "applies only to those claimants who demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). The supreme court explained:

> We believe that this conclusion is consistent with the history and purpose of the office of the attorney general to prosecute misrepresentations involving only matters of public interest. Appellant was defrauded in a single one-on-one transaction in which the fraudulent misrepresentation, while evincing reprehensible conduct, was made only to appellant. A successful prosecution of his fraud claim does not advance state interests and enforcement has no public benefit, and is not a claim that could be considered to be within the duties and responsibilities of the attorney general to investigate and enjoin.

Id. (footnotes omitted).

In interpreting Minnesota's private-attorney-general statute, a federal district court stated:

> To determine whether a lawsuit is brought for the public benefit the Court must examine not only the form of the alleged misrepresentation, but also the relief sought by the plaintiff. Courts consistently focus their inquiry on the relief sought by the plaintiff, and find no public benefit where plaintiffs request only damages even when plaintiffs are suing for injuries resulting from mass produced and mass marketed products.

In re Levaquin Prod. Liab. Litig., 752 F. Supp. 2d 1071, 1077 (D. Minn. 2010) (quotation omitted). But "the fact that a plaintiff requests no injunctive relief does not preclude [a] party from satisfying the public benefit requirement." *Id.* (quotation omitted). The degree to which a defendant's alleged misrepresentation affects the public is also an important factor. *Id.* at 1078.

Parkos argues that construing the private-attorney-general statute to permit attorney fees in this case serves the purposes of Minnesota's public-works bidding statutes. Those statutes are intended to eliminate opportunities for committing "such abuses as fraud, favoritism, extravagance, and improvidence in connection with the letting of contracts" and to promote "honesty, economy, and above-board dealing in the letting of public contracts." *Sayer v. Minn. Dep't of Transp.*, 790 N.W.2d 151, 156 (Minn. 2010) (quotation omitted). Parkos asserts that B&H "knowingly submit[ted] a fraudulent bid to a public entity via the general contractor on a $746,500 public works project" and that "[i]t is axiomatic that [Parkos's] consumer fraud claim . . . furthers the public interest because taxpayers have a vested interest in preventing contractors like [B&H] from submitting fraudulent bids on public works projects funded with tax dollars."

In rejecting Parkos's argument, the district court characterized both the contract between B&H and Parkos and the misrepresentation as "single, one-on-one" transactions. The district court explained:

> While [respondents] were on notice that their bid would be included in some capacity in [Parkos's] bid to the City, this is very different from promoting misrepresentation through mass market publicity, like through television ads or through public meetings. . . . [Parkos] has not provided any legal citation finding that the mere involvement of a public entity in a contract for work brings the performance of the contract as between the general contractor and subcontractors within the private attorney general statute.
>
> The misrepresentation likewise involves a single, one-on-one transaction between a contractor and subcontractor which supports a finding of no public benefit. Nothing in the record suggests [respondents] have engaged in a pattern of conduct regarding similar misrepresentations, or that this occasion was anything more than a one-off circumstance.

We agree with the district court's analysis. The record does not indicate that the misrepresentation was more than an isolated occurrence or that the misrepresentation affected the public in either cost or performance of the contract. A potential public benefit is insufficient to satisfy the public-benefit requirement. *Behrens v. United Vaccines, Inc.*, 228 F. Supp. 2d 965, 971-72 (D. Minn. 2002); *see also Ly*, 615 N.W.2d at 312 (stating that when determining whether a party is entitled to attorney fees under the private-attorney-general statute, a district court "must take into account the degree to which the public interest is advanced by the suit, otherwise, every artful counsel could dress up his dog bite case to come under [the] statute" (quotations omitted)). The district court, therefore, properly concluded that Parkos was not entitled to recover attorney fees under the private-attorney-general statute. *Compare Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816, 821-22 (Minn. App. 2001) (determining that lawsuit benefited the public when a school "promoted its sports-medicine-technician program through television advertisements and sales presentations" and "[b]ut for [plaintiffs'] lawsuit, an indefinite class of potential consumers might have been injured in the same manner as were [the plaintiffs]"), *aff'd*, 655 N.W.2d 320 (Minn. 2003), *with Kivel v. Wealth Spring Mortg. Corp.*, 398 F. Supp. 2d 1049, 1056 (D. Minn. 2005) (concluding that lawsuit alleging fraud in connection with plaintiffs' refinancing application did not satisfy public-benefit requirement when complaint only alleged fraud relating to their application and "provided no indication that defendant's alleged conduct has affected the general public").

Affirmed.