STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1839

Patrick Dean, Joan Hunziker-Dean,
individually and as derivative representatives
of the Center Plaza Association of Rochester, Inc.,
Appellants,

vs.

CMPJ Enterprises, LLC, et al.,
Respondents,

Oxford Property Management, LLC,
Respondent,

and

Center Plaza Association of Rochester, Inc., nominal defendant,
Respondent.

Filed July 30, 2018
Affirmed
Peterson, Judge

Olmsted County District Court
File No. 55-CV-15-8650

Brian M. Childs, Nic S. Puechner, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota (for appellants)

Edward W. Gale, Thomas C. Atmore, Paul M. Shapiro, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., Minneapolis, Minnesota (for respondents CMPJ Enterprises, LLC, et al.)

William M. Topka, Robert B. Bauer, Dougherty, Molenda, Solfest, Hills & Bauer P.A., Apple Valley, Minnesota (for respondent Oxford Property Management, LLC)

Daniel J. Heuel, O'Brien & Wolf, L.L.P., Rochester, Minnesota (for respondent Center Plaza Association of Rochester, Inc.)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Reilly, 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 condominium-association dispute, appellant condominium-unit owners argue that the district court erred in (1) ruling that respondent condominium-association directors did not breach their fiduciary duties to the association and its members, (2) denying appellants' motion to amend the scheduling order without sufficient findings, (3) considering evidence that respondents did not produce during discovery, (4) determining that there are no genuine issues of material fact regarding appellants' civil theft claim against respondent management company, and (5) dismissing appellants' equitable accounting claim because there was no valid underlying claim. We affirm.

FACTS

Appellants Patrick Dean and Joan Hunziker-Dean own six residential condominium units on the 16th floor of the Center Plaza Building, which contains 67 residential units and four commercial units. Respondents C.D. Bhakta and Michael Bhakta own respondent CMPJ Enterprises, LLC (CMPJ), and CMPJ owns the largest commercial unit in the building (Unit 2), which takes up 52.47% of the building's total square footage and is used to operate a Holiday Inn hotel.

Respondent Center Plaza Association of Rochester, Inc. (the Association) governs and manages the building, and CMPJ manages the Association. In February 2014, CMPJ entered into a management agreement with respondent Oxford Property Management, LLC (Oxford) to perform accounting and administrative services for CMPJ for $2,000 per month.

The Association's board consists of seven directors, who each get one equal vote. Under the Association's bylaws, votes are allocated to each condominium unit based on the ratio of "the area of each unit to the area of all Units," and directors are elected by a majority of the member votes cast in the election at the annual meeting.

CMPJ bought Unit 2 in 2006, and, since 2007, C.D. Bhakta, Michael Bhakta, and two other directors have been appointed to the board by CMPJ based on its majority interest in the building. Two of the three remaining directors were elected at annual meetings to represent the building's residential-unit owners.

In 2007 or 2008, Patrick Dean was elected to the board as one of the directors representing residential-unit owners, and he served on the board through 2014. At the 2015 annual meeting, three members ran for the two director positions representing residential-unit owners, and Patrick Dean was not re-elected.

On December 15, 2015, the Deans began this action against respondents, alleging 13 counts for violations of the Minnesota Common Interest Ownership Act (MCIOA) and the Minnesota Nonprofit Corporation Act, conversion, civil theft, civil conspiracy, equitable accounting, and breach of fiduciary duty, and seeking attorney fees, costs, and

disbursements. Respondents moved for summary judgment, and the district court granted summary judgment dismissing all 13 counts.[1] This appeal followed.

D E C I S I O N

Summary judgment is appropriate when the record shows "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. We review the district court's grant of summary judgment de novo, to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 627 (Minn. 2012). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

I.

Unit 2 electricity costs

The Association's board treated electricity costs for Unit 2 as common expenses and assessed all unit owners for those costs. Residential units are metered separately, and unit owners pay for their own electricity. Unit 2 is metered on the building's main meter, which measures electricity consumption throughout the building. The parties presented

[1] In its order, the district court stated that "Counts I through XII of the First Amended Complaint are hereby DISMISSED." But in the memorandum that accompanied the order, the district court addressed 13 counts and stated that "summary judgment is appropriate with respect to Counts XI-XIII." Thus, we conclude that the order contains a typographical error and that the district court dismissed counts I through XIII.

conflicting expert testimony about the practicality of separately metering electricity used in Unit 2.

The Deans argue that

> [i]n the absence of any provision compelling the Bhaktas to charge the Association for their hotel's electricity usage, the Bhaktas improperly used CMPJ's control of the Association's Board to compel the Association to fund their hotel's electricity usage, subsidizing the for-profit hotel's operation at the expense of other unit owners. To rule that this election was justified by the Bylaws ignores the Bhaktas' fiduciary duty to the Association.

The MCIOA requires that a director "discharge the duties of the position . . . in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." Minn. Stat. § 317A.251, subd. 1 (2016); *see also* Minn. Stat. § 515B.3-103(a) (2016) (defining duty of care under MCOIA with reference to section 317A.251). This court has stated that, under the MCIOA, good faith "means observance of two standards: 'honesty in fact', and observance of reasonable standards of fair dealing." *Horodenski v. Lyndale Green Townhome Ass'n, Inc.*, 804 N.W.2d 366, 373 (Minn. App. 2011) (quoting Uniform Common Interest Ownership Act (1982) (U.L.A.) § 1–113 & cmt.).

The Deans argue that this "duty must also be viewed in the context of the Association's status as a nonprofit corporation." Under the Minnesota Nonprofit Corporation Act, a corporation is prohibited from "pay[ing] dividends or other pecuniary remuneration, directly or indirectly, to its members, other than to members that are

nonprofit organizations or subdivisions, units, or agencies of the United States or a state or local government." Minn. Stat. § 317A.011, subd. 6(2) (2016). The Deans contend that "[t]his prohibition is frustrated, if not outright violated, by the Association paying expenses for the sole benefit of CMPJ, in essence subsidizing the operations of a for-profit hotel." The district court concluded that because the Bhaktas acted in accordance with the Association's governing documents when treating the Unit 2 electricity expenses as common expenses, their conduct could not constitute a breach of the MCIOA.

The Association's governing documents include its declaration and its bylaws. The declaration defines "common elements" as "[a]ll portions of the Condominium except the Units" and "common expenses" as "[e]xpenditures made or liabilities incurred by or on behalf of the Association, together with any allocations to reserves." The bylaws further define "common expenses" to specifically include "utility charges not charged directly to Unit Owners." The board is authorized to levy assessments against unit owners for common expenses according to "the unit's percentage of undivided interest in the Common Elements." The district court concluded that because Unit 2's electricity costs were not metered separately and were not charged directly to CMPJ, they were common expenses under the bylaws, and the Bhaktas did not breach their fiduciary by acting in accordance with the bylaws.

The Deans argue first that the district court erred when it made the factual determination that CMPJ was not charged directly for energy consumed on the main electric meter. They contend that, in opposing summary judgment, they presented a utility bill addressed to "Holiday Inn City Centre," which is CMPJ's for-profit hotel, and that this

bill proves that CMPJ was charged directly for electricity measured on the main meter. But, although this bill was addressed to Holiday Inn City Centre, it does not identify CMPJ or any other entity as the customer responsible for paying the bill, and, therefore, does not create a fact issue as to whether CMPJ was charged directly for electricity.

The Deans also argue that the district court erred when it implicitly ruled that the definition of "common expenses" in the bylaws is unambiguous. They contend that the definition of common expenses in the bylaws should be interpreted to mean "utility charges *of a type* not charged directly to *any* unit owners" (emphasis added), and, because electricity charges are a type of utility charge that is charged directly to residential-unit owners, electricity charges are not common expenses. But nothing in the bylaws' definition of "common expenses," suggests that the term refers to a type of utility charge, rather than to a specific charge that was actually incurred but was not charged to a specific unit owner. The definition is unambiguous. *See Polk v. Mut. Serv. Life Ins. Co.*, 344 N.W.2d 427, 430 (Minn. App. 1984) (a court will not read ambiguity into an unambiguous document in order to alter or vary its terms).

The Deans also argue that the district court erred when it construed the bylaws' definition of "common expenses" in a manner that conflicts with the declaration's definition of "common expenses." The Deans are correct that, under paragraph 11.3 of the bylaws, in the case of any conflict between the provisions of the bylaws and the provisions of the declaration, the declaration controls. But we agree with the district court that the definitions of "common expenses" in the two documents are not inconsistent. As the district court concluded, the bylaws' definition further defines the phrase, "liabilities

incurred by or on behalf of the Association," which is in the declaration's definition, to specifically include "utility charges not charged directly to Unit Owners." When read together, the declaration and bylaws unambiguously identify the costs of electricity used in the building that are not charged directly to a unit owner as liabilities incurred by the Association.

Finally, the Deans argue that the declaration's definition of "common expenses" is ambiguous because the phrase "by or on behalf of the Association" could mean "benefitting the Association." But nothing in the definition suggests that determining whether a liability incurred by or on behalf of the Association is a common expense requires a determination whether the liability provided a benefit to the Association. The plain language of the definition requires only that the liability was incurred by the Association. As we have already stated, we will not read ambiguity into an unambiguous document in order to be able to alter or vary its terms. The Deans may be dissatisfied with the way that the declaration and bylaws treat electricity used in Unit 2, but the Bhaktas' conduct was consistent with the unambiguous terms of the Association's governing documents, which demonstrates a reasonable standard of fair dealing.

Elevator repair and maintenance costs

There are four elevators in the building: one freight elevator, two elevators programmed to serve Unit 2, and one elevator programmed to serve the residential units. The board treated elevator maintenance and repair costs as common expenses and assessed the costs to all unit owners.

The MCIOA provides that "[u]nless otherwise required by the declaration . . . any common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides." Minn. Stat. § 515B.3-115(e)(1) (2016). Paragraph 6.1.(a) of the declaration provides that the costs of maintenance and repair of common elements are a common expense, but the declaration does not specifically address common expenses associated with maintenance or repair of limited common elements. Paragraph 1.13 of the declaration, however, does define "limited common elements" to include only "[t]hose portions of the Common Elements allocated . . . for the exclusive use of one or more but fewer than all of the units." Thus, under the MCIOA and the declaration, common expenses associated with the maintenance or repair of a common element exclusively used by fewer than all of the units shall be assessed against the units to which that limited common element is assigned.

The Deans argue that the district court erred in concluding that the freight elevator and the two elevators programmed to serve Unit 2 are common elements, rather than limited common elements. They contend that, because those elevators are limited common elements, the district court erred by ruling that the Bhaktas were authorized to force the Association to pay for expenses related to their repair and maintenance.

The district court determined that the freight elevator is not a limited common element because it serves all units. The record supports this determination. Patrick Dean testified in a deposition that all unit owners use the freight elevator with permission and by obtaining a code, and board-meeting minutes from 2008 state that residents were asked to

use the freight elevator when their elevator was down. Thus, the costs of maintaining and repairing the freight elevator are common expenses.

Although the district court determined that the elevators that served Unit 2 are common elements, it also determined that, even if those elevators are limited common elements, the Deans claim that elevator repair and maintenance costs were improperly treated as common expenses failed because "the record would not permit reasonable jurors to reach a non-speculative conclusion about damages." We need not address whether the district court erred in determining that the elevators that served Unit 2 are common elements because we agree with the district court's additional determination that, even if those elevators are limited common elements, the Deans failed to produce evidence sufficient to prove what damages the Association suffered as a result of treating the elevators as common elements.

"Speculative, remote, or conjectural damages are not recoverable at law." *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 839 (Minn. App. 1994), *review denied* (Minn. June 29, 1994). The Deans argue that they provided an invoice for servicing the freight elevator and evidence that all four elevators were overhauled at a cost of several hundred thousand dollars. But, because the freight elevator is not a limited common element, evidence of the cost of servicing it does not support the Deans' claim, and, as the district court concluded, the remaining evidence does not identify which elevators were serviced. Even if it would be reasonable for a jury to infer that the elevators that served the hotel were serviced at some time, the evidence would not permit them to do anything more than speculate about the cost of servicing those elevators.

II.

The district court's third amended scheduling order set a February 10, 2017 deadline for the plaintiffs to designate experts and make the disclosures required by Minn. R. Civ. P. 26.01(b), and an April 7, 2017 deadline for non-dispositive motions to be heard. "A schedule shall not be modified except by leave of court upon a showing of good cause." Minn. R. Civ. P. 16.02. "Except in unusual circumstances, a motion to extend deadlines under a scheduling order shall be made before the expiration of the deadline." Minn. R. Gen. Pract. 111.04.

On April 26, 2017, almost three weeks after the deadline for non-dispositive motions passed, the Deans filed a motion to extend the non-dispositive-motion deadline so that the district court could hear their motion to permit their expert to conduct testing to determine electricity usage in Unit 2. The district court denied the motion, and the Deans argue on appeal that the district court failed to make findings sufficient to support the denial.

The Deans argued in the district court that testing to determine electricity usage in Unit 2 was needed to determine damages caused by improperly treating the cost of the electricity as a common expense. The district court denied the Deans' motion before the court determined on summary judgment that treating the cost of the electricity as a common expense was not improper. Because we agree with the district court that it was not improper to treat the cost of the electricity as a common expense, damages for doing so are no longer an issue, and we will not address whether the district court's findings were

sufficient to support the denial of the Deans' motion to extend the non-dispositive-motion deadline.

III.

Although the management agreement between CMPJ and Oxford did not call for Oxford to provide services to the Association, CMPJ authorized Oxford to write checks on behalf of the Association. In 2014 and 2015, six Association checks were written to Oxford, four for $2,000, one for $4,000, and one for $14,000. The Deans' civil theft claim alleged that Oxford "impermissibly and on multiple occasions caused funds to be transferred from the Condo Association's operating account to itself." During her deposition, Melissa Greene, an Oxford employee, was questioned about Association checks that were written to Oxford, and she testified that two checks for $2,000 from the Association's account had been written in error, and when the error was discovered, Oxford refunded the money to the Association.

In their memorandum in response to CMPJ's and the Bhaktas' motion for summary judgment, the Deans argued that "[t]here is no documentary evidence in the record of this case that Oxford has repaid those monies." Oxford then provided with its reply memorandum in support of its motion for summary judgment a sworn declaration of Melissa Greene, and attached to the declaration as exhibits copies of checks, deposit slips, and check registers that showed payments made by Oxford to the Association. The Deans moved to strike these documents, and the district court denied their motion.

Minn. R. Civ. P. 26.01(B) requires a party to provide to the other parties all documents "that the disclosing party has in its possession, custody, or control and may use

to support its claims or defenses," within 60 days after filing an answer, unless a different time is set by stipulation or court order.

> A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert, the duty extends . . . to information provided through a deposition of the expert.

Minn. R. Civ. P. 26.05. If a party fails to provide information under rule 26.01 or 26.05, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Minn. R. Civ. P. 37.03(a).

The Deans argue that the district court erred by denying their motion to strike Melissa Greene's declaration because it contained documents that were disclosed for the first time in Oxford's reply memorandum supporting its summary-judgment motion. The Deans argue that they were denied the opportunity to conduct discovery related to the documents or question Greene about them in a deposition and that they were denied the opportunity to respond to the evidence.

> The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion. . . . In the absence of some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result.

Kroning v. State Farm Auto Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted).

The district court explained its denial of the motion as follows:

> In this case, the allegations within the First Amended Complaint focus on improper transfers from the Association to Oxford. In their depositions, Mr. Dickson and Ms. Greene were only questioned about checks written to Oxford in error for services provided to CMPJ. It wasn't until the Deans filed their memorandum and specifically asked for these documents that Oxford sought them out and became aware of their significance. Additionally, [Oxford's attorney] was unaware the documents even existed until he received the Deans' memorandum and inquired about them. It is unclear whether these documents were reasonably available to Oxford at the time of its initial disclosures. However, even if they were, it appears that Oxford failed to disclose this information because it was unaware of its significance to the claims at issue. Based on the unique circumstances in this case, the Court finds that Oxford's failure to disclose these documents was substantially justified.

(Footnotes omitted.)

During Greene's deposition, the Deans' attorney asked Greene about checks from the Association to Oxford, and Greene testified that she oversaw the process of paying back to the Association amounts that had been wrongfully paid to Oxford. The Deans' attorney then said, "I'm going to ask for the records of those transfers. I may have them, and if I do I'll let you know." The records were not formally requested, and Oxford produced them only after the Deans argued in their memorandum in opposition to summary judgment that there was no documentary evidence that Oxford repaid the money. Under these circumstances, where the Deans' attorney stated that he was going to ask for the records if he did not have them and then never formally asked for the records, the district court did

not abuse its discretion when it concluded that Oxford's failure to produce the records was substantially justified because Oxford was not aware of the significance of the records.

IV.

The Deans argue that, regardless of whether the Greene declaration was considered, the district court erred when it ruled that no issues of fact precluded summary judgment on their claim for civil theft. The district court concluded:

> [T]here is no evidence to support that Oxford intended to keep or use the Association's money. Of the six checks issued to Oxford, one was never cashed; three were issued to compensate Oxford for its own funds, which were accidentally placed in the Association's account; and two were issued to Oxford in error but subsequently returned. There is nothing within the record to rebut or contradict this evidence and otherwise show that Oxford took these funds with the intent of keeping or using them.

(Italics and footnote omitted.)

The Deans contend that Oxford's representation that it repaid the money that it received through checks from the Association is thrust into doubt by a summary of the Association's bank-account register that CMPJ produced as part of exhibit A to the Greene declaration. The summary lists three checks for $2,000 each that were written to Oxford Property Management. The date and check number for each check is listed, and the entry for each check is followed by the phrase "Management fee" and the name of a month in 2014. The Deans state that "[t]here is no mention of these payments having been error, nor is there any reference to the payments having been reimbursed by Oxford," and they appear to suggest that the brief phrase used to describe each check creates a fact issue.

It is not apparent what fact issue is created by the brevity of the phrase used to describe the checks. The document in which the phrase is used is plainly a summary, and there is no apparent reason why a more comprehensive description is needed to explain that the three checks were written to Oxford.

The Deans also argue that there is a fact issue regarding their civil theft claim because the district court concluded that, of the six disputed checks issued from the Association to Oxford, "two were issued to Oxford in error but subsequently returned," but Oxford never produced a copy of the voided or cashed check to substantiate this claim. Greene stated in her declaration: "Check Nos. 6156 and 6180 were paid back to the Association through Oxford's Check No. 8123. A true and accurate copy of the check and deposit slip is attached hereto as Exhibit B. The Court can see this deposit show up on Exhibit A-1 on page 6."

Exhibit B shows the check and a December 11, 2014 deposit slip for $4,000, and exhibit A-1 shows a $4,000 deposit into the Association's checking account on December 11, 2014. When read in the context of Greene's declaration, it is apparent that the district court's statement that two checks were "subsequently returned" means that two checks for $2,000 each were cashed by Oxford, but Oxford later returned $4,000 to the Association. Although the district court's statement that the checks, rather than $4,000, were returned is incorrect, this misstatement does not create a fact issue as to whether Oxford returned the $4,000 to the Association.

Finally, the Deans argue that there is a fact issue whether Oxford returned the $4,000 to the Association because the check register labeled as exhibit A to the Greene declaration

does not include the $4,000 deposit that is shown on exhibit A-1. Greene stated in her declaration that she attached exhibit A-1 because exhibit A, which had been produced during discovery, did not appear to be complete. Our review of exhibit A reveals that the final entry on one page of the check register is for check number 6319 on December 4, 2014. The first entry on the following page is for a deposit on December 12, 2014, which is followed by entries for four more deposits and then an entry for check number 6325 on December 17, 2014. There are no entries for checks numbered 6320 through 6324. Every page in exhibit A shows a similar gap between the entry at the bottom of the page and the entry at the top of the next page, which suggests that entries at the bottom of each page were omitted.

Exhibit A-1 includes entries for checks numbered 6320 through 6324, all on December 4, 2014, and entries for seven deposits between December 8, 2014, and December 12, 2014, which appear to have been entries that were omitted at the bottom of the page on exhibit A. One of these seven deposits is a $4,000 deposit on December 11, 2014. The Deans contend that the differences between exhibits A and A-1 create a fact issue about this deposit, which might be persuasive if exhibits A and A-1 were the only exhibits. But exhibit B includes a December 11, 2014 bank receipt for a $4,000 deposit, which independently shows that the deposit was made. Neither exhibit A nor any other evidence shows that the $4,000 deposit was not made, and we are not persuaded that there is a genuine fact issue whether Oxford returned the $4,000 to the Association.

V.

An equitable accounting is primarily available only "when a fiduciary owes an equitable duty to account and when the accounts at issue are exceedingly complicated." *United Prairie Bank–Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 57 n.3 (Minn. 2012). The district court dismissed the Deans' accounting claim because it ruled that they did not have a valid underlying claim. *See Cox v. Mortg. Elec. Registration Sys., Inc.*, 794 F. Supp. 2d 1060, 1065 (D. Minn. 2011) (stating that dismissal of accounting claim was warranted when it was premised on defendants' liability on other claims and those claims were dismissed), *aff'd*, 685 F.3d 663 (8th Cir. 2012). Because we conclude that the district court did not err in dismissing the Deans' underlying claims, we also conclude that the district court did not err in dismissing the Deans' accounting claim.

Affirmed.