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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1844

Morgan-Walg, LLC,
Respondent,

vs.

Nicollet Island Development Co., et al.,
Appellants

Filed August 6, 2018
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Hennepin County District Court
File Nos. 27-CV-16-17847, 27-CV-15-17418

William G. Cottrell, Andrew A. Green, Cottrell Law Firm, PA, Mendota Heights, Minnesota; and

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Michael J. Orme, Dana K. Nyquist, Orme & Associates, Ltd., Eagan, Minnesota (for appellants)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellants Nicollet Island Development Co. (Nicollet), Semper Development, Ltd. (Semper), and Howard Bergerud (collectively, the developers) challenge the district court's

grant of summary judgment in favor of respondent Morgan-Walg, LLC (Morgan-Walg). We affirm in part, reverse in part, and remand.

FACTS

In May 2009, Morgan-Walg and the developers agreed to participate in a joint venture for the development, construction, sale, and lease of ten Walgreens stores (development agreement). Pursuant to the development agreement, Morgan-Walg agreed to advance a series of initial payments to the developers, each of which would be evidenced and secured by a separate promissory note personally guaranteed by Bergerud, president of both Nicollet and Semper.

In January 2011, Morgan-Walg and the developers restructured their business relationship and executed a transfer "agreement for the purchase and sale of participation rights under [the] master development agreement" (transfer agreement). Under the transfer agreement, the developers agreed to purchase all of Morgan-Walg's participation rights in the Walgreens project and repay to Morgan-Walg all of its initial payments, equity capital, and the agreed-upon amount for Morgan-Walg's return on investment. The developers agreed to pay Morgan-Walg $23,717,818, to be evidenced by two promissory notes. One note was for $16,155,500, due in installments through September 2011, and the other note was for $7,562,318, due on November 15, 2011. Bergerud personally guaranteed payment of the amounts owed under both promissory notes.

The notes matured, but the developers failed to pay in full. In March 2012, the parties executed a forbearance agreement (first forbearance agreement). The parties agreed that the unpaid balance due on the notes was $20,005,500, not including accrued interest

and other expenses, fees, and costs. In addition, Morgan-Walg agreed to forbear from enforcing its rights and remedies under the promissory notes and guaranty until December 2013.

The developers defaulted on the first forbearance agreement, and in August 2013, the parties executed another forbearance agreement (second forbearance agreement). The parties agreed that, as of August 2013, the unpaid principal on the notes was $18,978,500, not including accrued interest, expenses, fees, and costs. Under the second forbearance agreement, Morgan-Walg agreed to forbear from enforcing its rights and remedies under the promissory notes and guaranty until June 2016, when the full balance would be due.

In October 2015, Morgan-Walg brought suit against the developers and filed a confession of judgment. The district court entered judgment against the developers for $22,513,503.81. On January 13, 2016, the parties executed another forbearance agreement (final forbearance agreement), in which the parties stipulated to the dismissal of Morgan-Walg's lawsuit and to vacating the $22 million judgment. That agreement also extended the deadline for payment on the promissory notes and guaranty to February 2016.

In December 2016, Morgan-Walg filed the present suit against the developers, alleging breach of the promissory notes and guaranty. Morgan-Walg moved for summary judgment and for an award of attorney fees and costs. In support of its motion, Morgan-Walg filed an affidavit of its chief financial officer (CFO affidavit). The CFO affidavit listed specific amounts of unpaid principal and accrued interest owed under the promissory notes. Morgan-Walg also filed two affidavits in support of its motion for attorney fees and costs, including itemized lists describing the basis for the fees.

In response to Morgan-Walg's summary-judgment motion, the developers filed Bergerud's declaration, in which he admitted that the developers owed money to Morgan-Walg but asserted that the amount was "millions of dollars less than what Morgan-Walg seeks in its motion." Bergerud asserted that, because no discovery had been conducted, "the exact amount due and owing cannot be determined at this time."

The district court ultimately continued Morgan-Walg's summary-judgment motion to allow for discovery. The order set a discovery deadline of August 11, 2017. The developers' counsel withdrew approximately one week after the district court issued its order, and the parties conducted no discovery. The district court ultimately granted Morgan-Walg's motions for summary judgment and attorney fees, awarding Morgan-Walg the amounts listed in the CFO affidavit and the amounts of fees and costs listed in Morgan-Walg's other affidavits.

In October 2017, the developers filed an additional affidavit asserting that it was common for one of the principals at Morgan-Walg to change the terms of written agreements "through oral agreements and handshake deals." The affiant also stated that he "personally witnessed [the principal] making threats to Bergerud." Later in October, the developers requested reconsideration of the order granting summary judgment and attorney fees. In support of that request, they filed a new Bergerud affidavit dated October 27, 2017. The district court denied the request for reconsideration. This appeal follows.

D E C I S I O N

I. The district court did not err by declining to consider evidence filed after the court entered judgment against the developers.

The developers argue that the district court erred by declining to consider evidence submitted after the court ruled on the summary-judgment motion. We disagree.

The record does not remain open for the submission of new evidence after the district court grants summary judgment. *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998). "If the record were to remain open after summary judgment, a ruling on a pretrial summary judgment motion would be subject to continued changes throughout the course of litigation as new evidence was discovered and submitted." *Id.*

Here, the developers twice submitted new evidence after the district court entered judgment in favor of Morgan-Walg. The district court did not err by declining to consider that evidence for purposes of summary judgment. Furthermore, because that evidence was not part of the summary-judgment record, we decline to consider it in determining whether the district court erred by granting summary judgment.

II. The district court erred by granting summary judgment in favor of Morgan-Walg.

The developers argue that the district court erroneously granted summary judgment in favor of Morgan-Walg. We agree.

We review a district court's grant of summary judgment de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). This court "review[s] the record to determine whether there is any genuine issue of material fact and

whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). We view the evidence in the light most favorable to the nonmoving party and do not make factual determinations or weigh the evidence. *McIntosh Cty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008). A genuine issue of material fact exists "when the nonmoving party presents evidence that is sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.* (quotation omitted).

A. A genuine issue of material fact exists as to the amount of damages Morgan-Walg is owed under the promissory notes and guaranty.

The developers argue that a genuine issue of material fact exists as to the amounts owed to Morgan-Walg under the promissory notes and guaranty. We agree.

The second forbearance agreement and the CFO affidavit identify different amounts of unpaid principal. The second forbearance agreement, executed in August 2013, indicated that the amount of unpaid principal was $18,978,500.[1] Conversely, the CFO affidavit, executed in December 2016, lists the amount of unpaid principal as $20,717,818. The CFO affidavit does not explain the discrepancy between these two numbers, and Morgan-Walg offers no explanation for the discrepancy other than its assertion, without citation to the record, that "[t]he loan balance changed over time and the

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[1] The district court awarded Morgan-Walg $22,513,503.81 in 2015, but the record does not contain underlying documentation explaining how that figure was generated. It is not clear how much of the $22 million judgment was composed of unpaid principal as opposed to interest and other fees and costs. Therefore, we do not rely on the 2015 judgment for purposes of this analysis.

forbearance/modification documents were executed at various points during the life of the loan, reflecting the different balances owed at different times."

Additionally, in his declaration filed in opposition to Morgan-Walg's motion, Bergerud asserted that, between Novermber 28, 2010 and July 8, 2011, Morgan-Walg was paid $5,010,000 and that he "d[id] not see how those payments were accounted for in Morgan-Walg's motion for summary judgment." A party cannot defeat summary judgment "by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). However, the developers provide particular dates of specific payments paid that were not accounted for. Taken along with the conflicting amounts of unpaid principal and the lack of any documentation supporting the accuracy of the numbers listed in the CFO affidavit, the developers' assertion goes beyond raising a "metaphysical doubt" as to the CFO affidavit's accuracy. *See id.*

Viewing this evidence in the light most favorable to the developers, *see McIntosh*, 745 N.W.2d at 545, we conclude that a genuine issue of material fact exists as to the amount owed under the promissory notes and personal guaranty. As a result, the district court erred by granting Morgan-Walg's motion for summary judgment.[2] We therefore reverse and remand for proceedings consistent with this opinion.

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[2] We also note that the promissory notes and guaranty contain choice-of-law clauses indicating that they should be construed under Kansas law. The district court applied only Minnesota law in its order.

B. There is no genuine issue of material fact as to whether the developers signed the first forbearance agreement under duress.

The developers claim that they executed the first forbearance agreement under duress. We are not persuaded. Minnesota law recognizes duress as a defense to a contract "when there is coercion by means of physical force or unlawful threats, which destroys one's free will and compels compliance with the demands of the party exerting the coercion." *St. Louis Park Inv. Co. v. R.L. Johnson Inv. Co.*, 411 N.W.2d 288, 291 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987).

Even if we were to assume that Bergerud executed the first forbearance agreement under duress, that fact is not material to Morgan-Walg's motion for summary judgment. The promissory notes, not the forbearance agreements, constitute the basis for Morgan-Walg's claims. The summary-judgment record contains no evidence suggesting that the developers executed the promissory notes or guaranty under duress. The district court did not err by rejecting the developers' duress argument.

C. The developers' unconscionability argument fails as a matter of law.

The developers argue that the transfer agreement and corresponding promissory notes and guaranty are unconscionable and unenforceable. We disagree. This court reviews de novo whether a contract provision is unconscionable. *Osgood v. Medical, Inc.*, 415 N.W.2d 896, 901 (Minn. App. 1987), *review denied* (Minn. Feb. 12, 1988). "A contract is unconscionable if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."

Kauffman, Stewart, Inc. v. Weinbrenner Shoe Co., 589 N.W.2d 499, 502 (Minn. App. 1999) (quotation omitted).

Here, the developers argue that the transfer agreement, promissory notes, and guaranty are "outrageous and unfair, and shock[] the conscious [sic]." But Bergerud asserted in his February 2017 declaration that the developers signed the promissory notes "for purposes of restructuring the business relationship." Furthermore, the second forbearance agreement acknowledged that both parties were "sophisticated commercial part[ies] experienced in transactions" and were represented by counsel. On this record, we conclude that the transfer agreement and corresponding promissory notes and guaranty were not unconscionable.

II. The district court did not abuse its discretion by awarding attorney fees and costs to Morgan-Walg.

The developers argue that the district court improperly awarded attorney fees and costs to Morgan-Walg. We disagree.

This court reviews an award of attorney-fees and costs for an abuse of discretion. *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). "Because the district court is the most familiar with all aspects of the action from its inception through post-trial motions, it is in the best position to evaluate the reasonableness of requested attorney fees." *650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 494 (Minn. App. 2016) (quotation omitted), *review denied* (Minn. Nov. 23, 2016). "The reasonable value of an attorney's work is a question of fact, and the district court's findings will be upheld unless they are clearly erroneous." *Id.* Generally, attorney

fees are only recoverable under a specific contract or a statute permitting recovery. *Midway Nat. Bank v. Gustafson*, 282 Minn. 73, 82, 165 N.W.2d 218, 224 (1968).

Here, the promissory notes state that, in the event Morgan-Walg becomes a plaintiff or defendant in a legal proceeding relating to the promissory notes, the developers "shall repay to [Morgan-Walg] on demand, all costs and expenses so incurred, including reasonable attorneys' fees." The guaranty also contained language entitling Morgan-Walg to "reasonable attorneys' fees, expenses and costs incurred . . . in the collection and enforcement of the . . . [g]uaranty."

First, the developers argue that Morgan-Walg's attorney fees relating to the filing of a confession of judgment in 2015 and a motion to impose a temporary receiver are not reasonable. In particular, the developers argue that Morgan-Walg filed the confession of judgment outside of the statute of limitations.

Morgan-Walg's request for attorney fees is based on the contractual language in the promissory notes, which broadly allows Morgan-Walg to collect reasonable attorney fees incurred "in attempting to collect the amounts due." Even if we assume that the confession of judgment was filed beyond that statute of limitations, that filing exists in the context of a years-long effort to collect millions of dollars from the developers. The developers moved to vacate the 2015 judgment, but the district court never ruled on their motion because the parties stipulated to vacate the judgment. The final forbearance agreement, which extended the payment deadline to February 29, 2016, was executed one day before the parties executed the stipulation to vacate the 2015 judgment. As part of that forbearance agreement, the parties agreed to file the stipulation to vacate the 2015 judgment, and

Morgan-Walg agreed to release all claims arising out of the 2012 confession of judgment. In the context of Morgan-Walg's years-long effort to collect from the developers, we cannot say, in isolation, that the district court abused its discretion by determining that attorney fees stemming from the 2015 lawsuit were reasonable.

Second, the developers argue that Morgan-Walg did not fully comply with Minn. R. Gen. Pract. 119.[3] Morgan-Walg does not dispute that its affidavits did not fully comply with rule 119, but argues instead that any problems with its affidavits were "de minimus."

In any action in which an attorney seeks attorney fees of $1,000 or more, application for approval of fees must be made by motion and supported by an affidavit. Minn. R. Gen. Pract. 119.01-.02. The affidavit must describe the work performed, hourly rate, and a detailed itemization of the specific work performed. Minn. R. Gen. Pract. 119.02. "A district court has discretion to strictly enforce or to waive the requirements of rule 119 when considering a motion for attorney fees." *Rooney v. Rooney*, 782 N.W.2d 572, 577 (Minn. App. 2010). Furthermore, "when . . . the court is familiar with the history of the case and has access to the parties' financial information, it may waive the requirements of [r]ule 119." *Gully v. Gully*, 599 N.W.2d 814, 826 (Minn. 1999).

[3] The developers also argue that Morgan-Walg is not entitled to attorney fees for work described in Aaron Jackson's affidavit because he "is not an attorney of record." Jackson is an attorney licensed to practice in Kansas, and Morgan-Walg moved to admit Jackson pro hac vice along with its other motions. Although the district court never explicitly granted the motion to admit, the district court permitted Jackson to argue the summary-judgment motion, and the developers did not object. We conclude that the district court granted Morgan-Walg's motion to admit Jackson.

Here, Morgan-Walg presented the district court with extensive records detailing all work performed by its attorneys from May 2013 to the present. Based on this record, the district court did not abuse its discretion by waiving the requirements of rule 119.

Finally, the developers argue that the district court improperly awarded certain costs to Morgan-Walg, including costs for computer-aided legal research and travel expenses. No binding Minnesota authority resolves this question.

Morgan-Walg was awarded $7,717 for Westlaw computer research and $207 for Lexis computer research. The developers rely on Eighth Circuit caselaw for the proposition that computer-assisted legal research is a component of attorney fees and cannot be collected as an independent item of cost. *See Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 695 (8th Cir. 1983) ("[C]omputer-aided research, like any other form of legal research, is a component of attorneys' fees and cannot be independently taxed as an item of cost in addition to the attorneys' fee award.").

In 2011, however, the Eighth Circuit noted that *Leftwich* was limited to the reimbursement of costs under fee-shifting statutes and declined to extend *Leftwich* to cases in which "expenses are being reimbursed pursuant to a negotiated settlement." *In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F.3d 913, 918 (8th Cir. 2011). The Eighth Circuit also recognized that "[t]he prevailing view among other circuits is to permit awards to reimburse counsel for the reasonable costs of online legal research." *Id.* at 918-19. The court explained that online research is typically billed as a cost separately from the attorneys' hourly rates and concluded that the federal district court did not abuse its discretion by awarding costs for computer-assisted legal research. *Id.* Considering the

Eighth Circuit's more recent analysis, which we deem persuasive, we conclude that the district court did not abuse its discretion by awarding Morgan-Walg costs for computer-assisted legal research.

With regard to travel expenses, neither party cites any caselaw relating to the recovery of costs for travel expenses. In the absence of any authority to the contrary, we conclude that the district court did not abuse its discretion by awarding costs for travel.

Affirmed in part, reversed in part, and remanded.