STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0366

Daniel J. Engstrom,
Appellant,

vs.

Whitebirch, Inc., et al.,
defendants and third party plaintiffs,
Respondents,

vs.

Daniel J. Engstrom,
third party defendant,
Appellant.

Filed September 10, 2018
Affirmed
Halbrooks, Judge

Crow Wing County District Court
File No. 18-CV-17-2657

Carl E. Christensen, Christensen Law Office PLLC, Minneapolis, Minnesota; and

Prentiss Cox, Prentiss Cox Attorney At Law, Minneapolis, Minnesota (for appellant)

Jonathan D. Wolf, Nicholas R. Delaney, Rinke Noonan, St. Cloud, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's dismissal of his claim under Minn. Stat. § 8.31, subd. 3a (2016), the private attorney general statute, arguing that the district court erred by determining that he had not adequately pleaded that he had been injured by respondents' alleged violation of the Minnesota Consumer Fraud Act (MCFA), Minn. Stat. § 325F.69 (2016). We affirm.

FACTS

Appellant Daniel J. Engstrom's mother purchased a timeshare within respondent Whitebirch, Inc.'s[1] timeshare community on June 7, 2001. One month later, Engstrom's mother signed a joint-ownership authorization form authorizing respondent Breezy Point to add Engstrom to the deed as a joint owner. On August 5, 2002, Whitebirch issued a deed that listed Engstrom and his mother as joint tenants. The deed was signed by the vice president of Whitebirch and notarized.

Engstrom's mother used the timeshare until her death in July 2015. In August 2016, a Whitebirch employee contacted Engstrom, informed him that he had been added as a joint owner to the timeshare deed in 2001, and stated that he could either surrender the property by signing a quitclaim deed or pay the outstanding fees and keep the property. The Whitebirch employee contacted Engstrom two more times in November and December

[1] Respondent Whitebirch Estates Owners Association, Inc. is responsible for and oversees the rules and administration of the Whitebirch timeshare community. Respondent Breezy Point International, Inc. is a corporation that manages the Whitebirch timeshare community and oversees the sale of its timeshare properties.

to see if he would pay outstanding maintenance fees for the timeshare and to determine if he wanted to surrender or keep the property.

In January 2017, Engstrom's attorney sent a letter to Whitebirch, stating that Engstrom refused to pay the maintenance fees and that the deed was invalid because it was not delivered to his client and had an invalid notary stamp. Engstrom requested that Whitebirch cancel the statement for fees, pay him $2,500 for fraud and special damages, and send him the recorded deed. Whitebirch responded, refusing to pay him $2,500 in damages and requesting that he sign the quitclaim deed. Whitebirch also informed Engstrom that a timeshare owner is responsible for recording the deed with the county and that his mother did not record her deed.

Engstrom brought suit against respondents, alleging that they violated the MCFA, Minn. Stat. § 325F.69, subd. 1, by fraudulently adding Engstrom as an owner to either collect fees that he did not owe or to compel a sale of his mother's timeshare property. Engstrom further alleged that respondents violated the MCFA by knowingly engaging in deceptive practices by using a notary with a "revoked notary stamp to falsely certify and acknowledge hundreds of timeshare deeds." In the remaining counts, Engstrom asserted claims of general fraud, fraudulent conveyance, and violation of the Minnesota quiet title statute under Minn. Stat. §§ 559.01-.25 (2016). Engstrom sought (1) to enjoin respondents from engaging in fraud, (2) a declaratory judgment that he is not responsible for the maintenance fees, (3) a judgment quieting title, (4) and an order determining that respondents violated the MCFA and awarding him his costs, disbursements, and reasonable

attorney fees pursuant to Minnesota's private attorney general statute, Minn. Stat. § 8.31 (2016).

Respondents denied all allegations of fraud and asserted a counterclaim, alleging that Engstrom tortiously interfered with prospective business relations. Respondents also asserted a third-party complaint, seeking foreclosure of Engstrom's timeshare property interest and cancellation of the purchase contract that conveyed the interest to Engstrom and his mother as joint tenants on the ground that the deed was never recorded. Respondents moved to dismiss Engstrom's complaint with prejudice, and requested that the district court (1) order Engstrom to pay the maintenance fees, costs, and attorney fees; (2) determine all rights and interests that the parties have in the timeshare and determine that respondents' rights are superior to any other interest in the timeshare, (3) bar Engstrom from any equity or interest in the timeshare, (4) cancel the 2001 purchase contract, and (5) order the sale of the timeshare.

Engstrom moved to dismiss respondents' counterclaims under Minn. R. Civ. P. 12.02(e). Respondents brought a separate motion to dismiss Engstrom's complaint with prejudice under Minn. R. Civ. P. 12.02(e) and moved for attorney fees and expenses under Minn. R. Civ. P. 11.03.

The district court held a hearing on the motions to dismiss and respondents' rule 11 motion. At the hearing, the parties stipulated that Engstrom has no interest in the timeshare property. Respondents dismissed their third-party counterclaims, and Engstrom dismissed his claim that respondents violated Minnesota's quiet-title statute. Respondents argued that Engstrom lacks standing to sue because he has not suffered an injury, has paid no fees,

and could have avoided any liability for the fees by signing a quitclaim deed. Engstrom argued that the deed is fraudulent and that he suffered an injury by having to hire an attorney to investigate the timeshare's title. The district court denied respondents' rule 11 motion and dismissed Engstrom's and respondents' claims with prejudice. Engstrom now appeals.

D E C I S I O N

A. Standard of Review

The parties disagree on what standard of review we should apply when analyzing the district court's order. Engstrom argues that this court should apply a de novo standard of review because the district court dismissed his complaint under Minn. R. Civ. P. 12.02(e). Respondents argue that this court should instead analyze the order under the summary-judgment standard of review because both parties presented matters outside the pleadings. *See* Minn. R. Civ. P. 12.02 ("If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ."); *see also Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 328 (Minn. 2013) (characterizing a district court's order dismissing the plaintiff's complaint as one for summary judgment because the plaintiff's motion did not cite to any Minnesota Rules of Civil Procedure, the defendants responded to the motion as one for summary judgment, the parties presented matters outside the pleadings, and the district court relied on matters outside the pleadings).

Engstrom brought his motion to dismiss under Minn. R. Civ. P. 12.02(e), arguing that respondents' counterclaim failed to state a claim upon which relief can be granted. Respondents also brought their motion under Minn. R. Civ. P. 12.02(e). The district court treated both motions as motions to dismiss, cited caselaw concerning motions to dismiss, and did not rely on matters outside of the pleadings. Because the district court and both parties treated the motions as motions to dismiss, we will review de novo the district court's order dismissing Engstrom's complaint under Minn. R. Civ. P. 12.02(e).

The question to be answered is "whether the complaint sets forth a legally sufficient claim for relief." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "A pleading must contain a short plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted). When reviewing a district court's order dismissing a complaint under rule 12.02(e), we consider only the facts alleged in the complaint, accept those facts as true, and construe all reasonable inferences in favor of the nonmoving party. *Id.*

B. Injury

The district court dismissed Engstrom's complaint seeking attorney fees and costs under the MCFA and the private attorney general statute, Minn. Stat. § 8.31, subd. 3a, because it determined that he had not pleaded that he had been injured by respondents' conveyance of the timeshare deed. Engstrom argues the district court erred because his claim for attorney fees and litigation costs satisfy the injury requirement under the MCFA and the private attorney general statute.

The attorney general has broad statutory authority to enforce laws regarding unlawful business practices, including the MCFA. Minn. Stat. § 8.31, subds. 1, 3a (2016). Additionally, the private attorney general statute provides that "any person injured by a violation of [the MCFA] may bring a civil action and recover damages, together with costs and disbursements, including . . . reasonable attorney's fees." *Id.*, subd. 3a. Before Engstrom can recover attorney fees under the private attorney general statute, he must be able to prove a claim arising out of one of the statutes listed in Minn. Stat. § 8.31, subd. 1. Therefore, we must first determine whether Engstrom sufficiently pleaded a violation of the MCFA before analyzing whether he is entitled to attorney fees under Minn. Stat. § 8.31, subd. 3a.

The MCFA provides:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

Minn. Stat. § 325F.69, subd. 1. "Merchandise" under the MCFA includes real estate. Minn. Stat. § 325F.68, subd. 2 (2016).

To state a claim alleging a violation of the MCFA, a plaintiff must plead that "the defendant engaged in conduct prohibited by the statute[] and that the plaintiff was damaged thereby." *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001); *Wexler v. Bros. Entm't Grp., Inc.*, 457 N.W.2d 218, 221 (Minn. App. 1990) (stating "to prevail on a consumer protection claim, [the plaintiff] must prove that [the defendant]

violated . . . Minn. Stat. § 325F.69 and that [the plaintiff] was injured in some way by the violation"). Nominal damages are sufficient to support the injury requirement of the MCFA. *Wexler*, 457 N.W.2d at 222. Minnesota courts follow the out-of-pocket rule to measure monetary damages resulting from fraudulent representations that induced a contract. That rule provides that,

> where the property is not returned, the measure of damages is the difference between the actual value of the property received and the price paid for it, and in addition thereto such other or special damages as were naturally and proximately caused by the fraud prior to its discovery, inclusive of restitution for expenses reasonably and necessarily incurred after discovery of the fraud in a bona fide effort to mitigate the aforesaid damages.

Yost v. Millhouse, 373 N.W.2d 826, 830-31 (Minn. App. 1985) (quotation omitted).

Because Engstrom has not paid any value for the property and stipulated that he has no ownership interest in it, it is not possible to measure the difference between the price he paid for the timeshare interest and its actual value. Therefore, the out-of-pocket rule does not apply to Engstrom's claim. But Engstrom contends that the expense of hiring an attorney, by itself, constitutes an injury because Whitebirch limited his options to either signing a quitclaim deed or paying the fees, thereby necessitating that he hire an attorney to help him resolve a fraudulent demand. Engstrom relies on *Love v. Amsler* to support this argument. 441 N.W.2d 555, 560 (Minn. App. 1989), *review denied* (Minn. Aug. 15, 1989).

In *Love*, a tenant, in response to her landlord's action in conciliation court for unpaid rent and damages, sued her landlord under Minn. Stat. § 325F.69, subd. 1 (1988), alleging that he required the tenants to pay unincurred water bills, unsupported cleaning and damage costs, and nonexistent attorney fees. *Id.* at 557. The district court found that the landlord engaged in deceptive practices and awarded the tenant damages in the form of a rent abatement. *Id.* The district court also awarded the tenant attorney fees under Minn. Stat. § 8.31, subd. 3a (1988). On appeal, the landlord argued that the tenant should not have been awarded attorney fees because the tenant had not suffered any damages. *Id.* at 560. We rejected that argument, reasoning that the effect of having to defend against the landlord's deceptive practices satisfied the injury requirement under Minn. Stat. § 8.31. *Id.*

We disagree with Engstrom's assertion that *Love* stands for the principle that a plaintiff's incurrence of attorney fees and litigation costs, alone, satisfies the injury requirement under the MCFA. The tenant in *Love* was awarded actual damages for the MCFA violation—specifically, an abatement of rent, in addition to attorney fees and costs under Minn. Stat. § 8.31, subd. 3a.

Engstrom also contends that he need not allege pecuniary loss to sufficiently plead an injury under the MCFA, but instead may satisfy the injury requirement by asserting that he would have taken another course of action, absent respondents' alleged fraud. Engstrom alleges that, under this theory, he satisfied the injury requirement because he would not have been required to hire an attorney if respondents had not fraudulently added him as a co-owner of his mother's timeshare interest.

In *D.A.B. v. Brown*, patients alleged that a medical doctor committed fraud by failing to disclose that he received kickbacks for a drug that he prescribed. 570 N.W.2d 168, 169-70 (Minn. App. 1997). We concluded that the patients did not sufficiently plead an injury under the MCFA because the complaint only revealed a general allegation that the patients had been harmed by the kickback scheme. *Id.* at 173. We noted that the patients had not sought damages for a price differential caused by the doctor's failure to disclose or alleged that they would have switched drugs if the doctor had disclosed the kickback scheme. *Id.*

Brown supports the conclusion that a person may satisfy the injury requirement under the MCFA by alleging that he would have taken another course of action, absent the alleged fraud. *See Brown*, 570 N.W.2d at 169-70. But Engstrom did not plead that he would have taken another course of action. The district court stated in its order that Engstrom alleged that respondents "gave [him] an ultimatum, to either pay the fees associated with the timeshare or sign a quitclaim deed. But, even in the event of this ultimatum, there is still no injury to Mr. Engstrom because he did not take any action that may have caused him injury."

Engstrom has cited no caselaw that supports his theory that attorney fees and litigation costs, by themselves, constitute damages under an MCFA claim. Engstrom experienced no monetary loss that was caused by respondents and could not have been injured by the conveyance of a property interest that he disclaims interest in. Engstrom has not sufficiently pleaded that he was injured by respondents' purported violation of the MCFA. Because Engstrom has not adequately pleaded a claim under the MCFA, he cannot

recover under the private attorney general statute. *See* Minn. Stat. § 8.31, subds. 1, 3a. We conclude that the district court did not err by granting respondents' motion to dismiss for failing to state a claim.

Affirmed.