STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1854

Hardin County Savings Bank, et al.,
Appellants,

vs.

Housing and Redevelopment Authority of the City of Brainerd, et al.,
Defendants,

James H. Bedard, Inc.,
Respondent.

Filed September 26, 2011
Affirmed
Worke, Judge
Concurring in part, dissenting in part, Hudson, Judge

Crow Wing County District Court
File No. 18-CV-08-6711

Thomas J. Radio, Hinshaw & Culbertson, LLP, Minneapolis, Minnesota; and

Stanley J. Thompson (pro hac vice), Davis Brown Law Firm, Des Moines, Iowa (for appellants)

Michael T. Feichtinger, Cally R. Kjellberg, Quinlivan & Hughes, P.A., St. Cloud, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

WORKE, Judge

Appellants assert that the district court erred by (1) dismissing their negligent-misrepresentation claim for failing to plead with particularity as required by Minn. R. Civ. P. 9.02, and (2) denying their request to amend their complaint. We affirm.

FACTS

In the fall of 2003, the Brainerd Housing and Redevelopment Authority (HRA) retained Dougherty & Company, LLC as the underwriter for the sale of municipal bonds intended to finance a large single-family-housing development. Dougherty compiled a private-offering memorandum (POM) to distribute to prospective financiers, and hired respondent James H. Bedard, Inc. to produce an appraisal of the project and a feasibility study to serve as the crux of the POM. Respondent completed the appraisal in October 2003. The appraisal valued the total project at $4,127,670, which equated to an individual-lot value of $43,386. The appraisal expressly noted that these figures included infrastructure improvements to the development that would be completed by the city, and the feasibility study projected that the subdivision would sell all 96 lots within seven years.

Dougherty distributed the POM to appellants Hardin County Savings Bank, Walworth State Bank, Eitzen State Bank, Northern National Bank n/k/a Frandsen Bank & Trust, Kindred State Bank and First National Bank. Dougherty notified appellants that the bonds would likely mature before enough lots were sold to pay off the city's debt, but assured appellants that the city would not allow the bonds to default. Appellants

purchased all the bonds issued by the Brainerd HRA for a collective total of $3.3 million in November 2003. The city began $1,085,000 of infrastructure improvements to the development shortly thereafter. Contrary to the representations in respondent's appraisal, however, the costs of the improvements were not included in the sale price of each individual lot; instead, a special assessment fee of $11,302 was added to the appraised price of $43,368 for a total, final sale price of $54,688. The Brainerd HRA sold three lots at this price prior to the bonds maturing. Appellants called the bonds in December 2006, and the Brainerd HRA defaulted on the bonds in November 2007.

In April 2008, appellants filed a complaint against the City of Brainerd, Dougherty, and respondent in United States District Court for the Northern District of Iowa. Appellants alleged claims for federal securities fraud and several state-law claims under Iowa and Minnesota law, essentially arguing that the special-assessment fees were omitted from the project appraisal and feasibility study to materially mislead appellants about the financial viability of the project and induce bond purchases. The federal district court determined that appellants failed to sufficiently plead loss causation to sustain their federal securities claims, and dismissed the securities claims with prejudice. The district court dismissed the remaining state-law claims without prejudice.

Appellants subsequently initiated this action in Minnesota district court against the same parties, asserting claims for statutory securities fraud and negligent misrepresentation. Respondent moved to dismiss both claims under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief may be granted; the Brainerd HRA and Dougherty also moved to dismiss the complaints filed against them. Appellants were

granted leave to amend their complaint and modified the claims filed against Dougherty. The amended complaint did not modify the claims asserted against respondent. The district court dismissed appellants' securities claims on the grounds of collateral estoppel, and dismissed the negligent-misrepresentation claims for failing to plead with particularity under Minn. R. Civ. P. 9.02. Appellants requested reconsideration or, alternatively, leave to amend their complaint for a second time. The district court denied both requests. Appellants now challenge the dismissal of the negligent-misrepresentation claim against respondent.

D E C I S I O N

Pleadings

Appellants first challenge the district court's dismissal of their negligent-misrepresentation claim for failure to state a claim upon which relief may be granted. When reviewing the dismissal of a pleading for failure to state a claim under Minn. R. Civ. P. 12.02(e), an appellate court must determine only whether the pleading sets forth a legally sufficient claim for relief. *Wiegand v. Walser Auto. Grps., Inc.*, 683 N.W.2d 807, 811 (Minn. 2004). A reviewing court must treat the allegations in the complaint as true and make all assumptions and inferences in favor of the nonmoving party. *Id.* Our review is de novo. *Stead-Bowers v. Langley*, 636 N.W.2d 334, 338 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002).

When a party pleads a fraud claim, "the circumstances constituting fraud . . . shall be stated with particularity." Minn. R. Civ. P. 9.02. A fraud claim is pleaded with particularity when "the ultimate facts are alleged." *Purdy v. Nordquist (In re Estate of*

Williams), 254 Minn. 272, 283, 95 N.W.2d 91, 100 (1959). A negligent misrepresentation constitutes fraud under Minnesota law. *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 618 (Minn. App. 1985). Accordingly, the strict pleading requirements of rule 9.02 apply to claims for negligent misrepresentation. *See id.* at 618-20 (applying the 9.02 requirements to a negligent-misrepresentation claim). A negligent-misrepresentation claim requires: (1) a duty of reasonable care in conveying information owed by one party to another in the course of a transaction where pecuniary interests are at stake; (2) breach of that duty by negligently providing false information; (3) reasonable reliance on the misrepresentations; and (4) damages proximately caused by the reliance. *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350-51 (Minn. App. 2001).

Appellants pleaded their negligent-misrepresentation claim against respondent as follows:

> 177. [Appellants] reallege the allegations contained in paragraphs 1 through 176 as fully set forth herein.
>
> 178. [Respondent] negligently supplied information to [appellants] which was false.
>
> 179. [Respondent] acted in the course of its business and had a financial interest in supplying the information.
>
> 180. [Respondent] intended to supply the information for the benefit and guidance of [appellants] in their business transactions.
>
> 181. Alternatively, [respondent] knew Dougherty intended to supply the information for the benefits and guidance of [appellants] in their business transactions.

> 182. [Respondent] intended the information to influence the transaction for which the information was supplied.
>
> 183. Alternatively, [respondent] knew that Dougherty intended the information to influence the transaction for which the information was supplied.
>
> 184. [Appellants] acted in reliance on the truth of the information supplied and were justified in relying on the information.
>
> 185. Information supplied by [respondent] was a proximate cause of the [appellants'] damage, in an amount greater than $50,000.

Appellants essentially argue that the district court erred by focusing solely on the abbreviated allegations presented in paragraphs 178 to 185 of the complaint without considering the catch-all provision in paragraph 177: "[Appellants] reallege the allegations contained in paragraphs 1 through 176 as fully set forth herein." Appellants argue that, viewing the complaint as a whole, the heightened pleading requirement is satisfied by various other allegations asserted against two other defendants that were scattered elsewhere in the complaint: "The . . . Appraisal was specifically designed to be relied upon by [appellants] to induce their purchase of the Bonds"; "The . . . Appraisal, among other things, was also based on flawed absorption and discount rates and opined [that] the real estate . . . was worth $4,127,670, which overstated the value . . . by, at least, $1 million"; "Based on the oral representations and the [POM], which included an Appraisal, Feasibility Study and Mortgage, [appellants] purchased all of the $3,300,000 of Bonds issued by the HRA"; "Because the . . . Appraisal was used to determine lot prices, and because of the errors in the appraisal, the price of $54,688 for each lot was too

high and resulted in virtually none of the lots being sold, despite a strong real estate market in 2004 and 2005"; "The failure to sell lots resulted from the materialization of the concealed risk caused by the misrepresentations and mistakes in the Appraisal, and this failure was foreseeable."

Appellants' argument is unconvincing for two reasons. First, allowing a plaintiff to simply regurgitate 176 elements of a complex complaint against multiple defendants in one catch-all provision would undermine the purpose of requiring a fraud claim to be pleaded with particularity. *See United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003) (noting that the particularity requirement of the similar federal rule "is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations"), *cert. denied*, 540 U.S. 875 (2003). Appellants sued three separate defendants for different conduct. By referring respondent to the previous 176 paragraphs of the complaint, appellants were forcing respondent to sift through allegations against other parties to figure out exactly what conduct it was defending; in fact, the majority of the complaint relates to Dougherty, as evidenced by the alternative assertions in paragraphs 177 to 185 where appellants assert their negligent-misrepresentation claim against respondent. There is no suitable justification as to why appellants could not have summarized their negligent-misrepresentation claim against respondent in the section of the complaint where the count is actually asserted.

Second, even if we view the complaint as a whole as appellants request, appellants still fail to plead with particularity. Nowhere in the complaint do appellants expressly outline what information respondent negligently misrepresented. The most concrete

assertion is: "The . . . Appraisal, among other things, was also based on flawed absorption and discount rates and opined [that] the real estate . . . was worth $4,127,670, which overstated the value . . . by, at least, $1 million." This allegation still does not elucidate exactly why respondent's appraisal was misrepresentative or negligent. Conversely, if appellants would have accused respondent of ignoring the likelihood of a special-assessment fee, miscalculating the improvement costs, inflating the base value of the land, or even outlining why the absorption and discount rates were flawed, respondent would have known the precise accusation it was to defend. Instead, appellants' complaint reads as though they simply disagree with respondent's appraisal. This is insufficient to meet the heightened pleading standard of rule 9.02. The district court did not err by dismissing appellants' negligent-misrepresentation claim for failure to state a claim upon which relief may be granted.

Leave to Amend Complaint

Appellants next challenge the district court's refusal to grant them leave to amend their complaint. A pleading may be amended once before a responsive pleading has been served. Minn. R. Civ. P. 15.01. Once a responsive pleading has been served, however, a party may only amend a pleading upon written consent from the opposing party or leave granted by the court. *Id.* "Ordinarily, amendments to pleadings should be freely granted except when prejudice would result to the other party." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). But "[t]he district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed

absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)).

Appellant argues that the district court abused its discretion because the motion to amend the complaint occurred at a relatively early stage in the proceedings, prior to substantial discovery, and respondent would not have been prejudiced. Appellants also argue that the district court overly relied on the dismissal of their Iowa complaint, asserting that the state-law claims were dismissed without prejudice.

These arguments are unconvincing. The fact remains that respondent filed its motion to dismiss separate from the dismissal motions filed by the other defendants, expressly arguing that "[Appellants'] claim for negligent misrepresentation . . . fail[s] to meet the heightened pleading standard required by Minn. R. Civ. P. 9.02" because the complaint "simply fails to plead the particular details of the alleged 'representations'" made by respondent. Despite this separate motion and its unambiguous challenge to the sufficiency of appellants' pleadings against respondent, appellants utilized their first opportunity to amend their complaint only to address the concerns raised by Dougherty. Regardless of whether the federal pleadings in Iowa were sufficient, appellants clearly had two chances in this present matter to meet the specific pleading requirements, including one opportunity merely weeks after respondent challenged the specificity of the negligent-misrepresentation claim. Accordingly, the district court did not abuse its discretion in denying appellants' request for leave to amend their pleadings.

Affirmed.

HUDSON, Judge (concurring in part and dissenting in part)

I concur with the majority's decision to affirm the district court's refusal to grant appellants leave to amend their complaint. But because I believe appellants pleaded the circumstances constituting fraud with sufficient particularity to satisfy Minn. R. Civ. P. 9.02, I respectfully dissent from that part of the majority opinion dismissing appellants' negligent-misrepresentation claim for failure to state a claim upon which relief may be granted.

A pleading setting forth a claim for relief, "shall contain a short and plain statement of the claim ." Minn. R. Civ. P. 8.01. "Each averment of a pleading shall be simple, concise, and direct," and "[n]o technical forms of pleading . . . are required." Minn. R. Civ. P. 8.05(a). And while rule 9.02 requires that fraud claims be stated with particularity, the rule does not define "particularity." *Stubblefield v. Gruenberg*, 426 N.W.2d 912, 914 (Minn. App. 1988). But the Minnesota Supreme Court has explained that the requirements of the rule "are satisfied when the ultimate facts are alleged." *In re Estate of Williams*, 254 Minn. 272, 283, 95 N.W.2d 91, 100 (1959). Further, Minnesota courts have looked to federal courts' interpretations of the federal pleading rules for further guidance because rules 8.05(a) and 9.02 are virtually identical to rules 8(d)(i) and 9(b) of the Federal Rules of Civil Procedure. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (stating that the federal rules are instructive on interpreting the Minnesota rules, especially when "the relevant language of the state and federal rules is identical"). And "particularity" under federal rule 9(b) has been construed to mean the "who, what,

when, where, and how: the first paragraph of any newspaper story." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549–50 (8th Cir. 1997).

Here, in simple, concise, and direct allegations, appellants gave the "who, what, when, where, and how" of their negligent-misrepresentation claim against respondent Bedard. Appellants acknowledge that their negligent-misrepresentation claim as pleaded in paragraphs 177–185 of their complaint gave few factual specifics. But paragraphs 29–45 and 160–161, in particular, provide a detailed description of the alleged misrepresentations contained in the Bedard appraisal and the feasibility study. Thus, as appellants rightly argue, when the complaint is considered as a whole—especially paragraph 177, which incorporates by reference the factual allegations previously set forth in paragraphs 1 through 176—Bedard was sufficiently put on notice of the particular fraud alleged.

The majority is critical of what it characterizes as appellants' "regurgit[ation] of 176 elements of a complex complaint in one catch-all provision." But Minn. R. Civ. P. 10.03 specifically provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading." And, despite its dismissal of appellants' negligent-misrepresentation claim, in its order and memorandum, the district court appeared to have no difficulty identifying and summarizing the facts underlying the claim, noting that "[t]he heart of [p]laintiffs' claims begins exactly with the October 2003 *Bedard [a]ppraisal and all claims emanate from there*." The district court went on to note that the allegation that "the Bedard [a]ppraisal was calculated based on '*flawed' data and incorrectly included the value of improvements in the lots in the lots' prices.*"

(Emphasis added.) In my view, this recitation demonstrates that the facts were pleaded with sufficient particularity.

Moreover, it appears from Bedard's December 31, 2008 memorandum of law in support of its motion to dismiss that Bedard likewise had little, if any, difficulty identifying the specific allegations that pertained to it and understood perfectly what was being alleged. Notably, in section III.B of the memorandum, Bedard summarizes the core facts—the "who, what, where, when and how"—underlying appellants' negligent-misrepresentation claim against it: specifically, that in the appraisal and feasibility study, "Bedard made representations to the Bondholders as follows: [o]mission of material fact with respect to $1,085,000 in special assessments levied against the lots, . . . [r]epresentations that the adjusted average basic site value was worth $43,386 and that amount "*takes into account the improvements*" such as streets, utilities, sidewalks . . ., [and r]epresentations that the real estate was worth $4,127,670, which overstated the value of the real estate by, at least, $1,000,000." Granted, these more specific allegations were pleaded in appellants' Iowa security fraud count against Bedard rather than the negligent-misrepresentation count against Bedard, but the same core facts supported both allegations. And, again, Bedard cannot credibly claim that it did not know the nature of the claims against it, or that it was in any way hampered in its efforts to prepare a defense. In addition, the feasibility study and the appraisal were attached to and incorporated by reference in the complaint. Minn. R. Civ. P. 10.03 specifically provides that "a copy of any written instrument which is an exhibit to a pleading is *a part of the statement of claim* or defense set forth in the pleading." (Emphasis added.)

The better practice would have been for appellants to summarize their negligent-misrepresentation claim against respondent in the section of the complaint where the count is actually asserted. But on this detailed record, when appellants have sufficiently alleged the "ultimate facts," dismissing their complaint for failure to state a claim elevates form over substance and ignores the admonition in Minn. R. Civ. P. 8.06 that "[all] pleadings shall be so construed as to do substantial justice." Accordingly, I would reverse the district court's dismissal of appellants' negligent-misrepresentation claim against Bedard.