STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2255

Provell, Inc.,
Appellant,

vs.

JetChoice I, LLC, et al.,
Respondents.

Filed July 18, 2011
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-09-10849

Edward T. Wahl, Jane E. Maschka, Faegre & Benson, LLP, Minneapolis, Minnesota (for appellant)

Michael H. Streater, Christianne A.R. Whiting, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

BJORKMAN, Judge

Appellant challenges the district court's grant of summary judgment dismissing claims of fraud and negligent misrepresentation based on appellant's failure to establish reasonable reliance. We affirm.

FACTS

This case arises out of appellant Provell, Inc.'s purchase of a private jet service membership from respondent JetChoice II, LLC. George Richards serves as Provell's chairman, president, and CEO. Respondent David N. Kloeber, Jr. formed respondents JetChoice I, LLC and JetChoice II in 2003 to sell flight time on private aircraft to individuals and businesses. JetChoice I is certified to provide air transportation for hire; JetChoice II operated a private jet membership program that allowed members to access Jet Choice I's private jet services for a certain number of flying hours per year. JetChoice I exists solely to provide air transportation services for the benefit of JetChoice II. Kloeber is the chief manager of JetChoice I and JetChoice II. Respondent Brian Overvig is the president of JetChoice I.

During fall 2008, Provell began considering purchasing a private-jet-service membership. In December, Richards met with Overvig to discuss JetChoice II's operations and Provell's interest in buying a membership. In January 2009, Richards met with Kloeber and discussed, among other topics, the financial health of the two JetChoice companies. Provell also conducted its own investigation into the financial health of the

JetChoice entities, which included having Provell's chief financial officer review and analyze JetChoice II's financial statements, consulting with outside counsel, and obtaining a Dun & Bradstreet report concerning the credit rating of the JetChoice entities. On January 10, Provell purchased a membership in JetChoice II, electing to pay a lump sum of $1.25 million and finance the additional $1 million purchase price. A few months later, both JetChoice companies ceased operations and filed for bankruptcy.

Provell initiated this action, asserting fraudulent misrepresentation, fraud in the inducement, negligent misrepresentation, breach of fiduciary duty, and other contract-based claims. Provell alleged that respondents made numerous misrepresentations about the financial stability of the JetChoice entities leading up to Provell's membership purchase. Respondents moved for summary judgment. The district court granted the motion, determining that Provell's fraud and misrepresentation claims fail as a matter of law because Provell failed to establish reasonable reliance on respondents' alleged misrepresentations. The district court emphasized Provell's sophistication and independent investigation of the finances of the JetChoice entities. The district court also dismissed the breach-of-fiduciary-duty claim as derivative and determined that the remaining claims are stayed by the bankruptcy proceedings.[1] This appeal follows.

D E C I S I O N

On appeal from summary judgment, we review the record de novo to "determine whether there are any genuine issues of material fact and whether a party is entitled to

[1] Provell does not appeal the district court's dismissal of its breach-of-fiduciary-duty claim or its determination that the remaining claims are stayed by the bankruptcy proceedings.

judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). To avoid summary judgment, an opposing party must present 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." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

To succeed on a fraud claim, a party must prove: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce the plaintiff to act in reliance thereon; (4) that the representation caused plaintiff to act in reliance thereon; and (5) that plaintiff suffered pecuniary damages as a result of the reliance.[2] *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). To prevail on a fraud claim, a party "must set forth evidence demonstrating both actual and reasonable reliance." *Hoyt Props, Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320-21 (Minn. 2007). Summary judgment in all cases "is mandatory against a party who fails to establish an essential element" of its claim. *Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. App. 1994).

[2] The elements of a negligent misrepresentation claim are similar to fraud. A person makes a negligent misrepresentation when (1) in the course of his or her business, profession, or employment, or in a transaction in which he or she has a pecuniary interest, (2) the person supplies false information for the guidance of others in their business transactions, (3) another justifiably relies on the information, and (4) the person making the representation has failed to exercise reasonable care in obtaining or communicating the information. *Valspar*, 764 N.W.2d at 369.

The focus of our analysis is the district court's determination that Provell did not establish reasonable reliance on the alleged misrepresentations as a matter of law. "Whether a party's reliance is reasonable is ordinarily a fact question for the jury unless the record reflects a complete failure of proof." *Hoyt*, 736 N.W.2d at 321. A party cannot reasonably rely on a representation if its falsity is known or obvious to the listener. *Spiess v. Brandt*, 230 Minn. 246, 252-53, 41 N.W.2d 561, 566 (1950). Thus, reliance in fraud cases is "generally evaluated in the context of the aggrieved party's intelligence, experience, and opportunity to investigate the facts at issue." *Valspar*, 764 N.W.2d at 369. Sophistication alone does not make reliance unreasonable as a matter of law. *See Hoyt*, 736 N.W.2d at 321 (holding that a party's legal training, business experience, and normal business practices did not make reliance unreasonable as a matter of law). But sophistication coupled with an independent investigation may bar a party from claiming reasonable reliance. *See Valspar*, 764 N.W.2d at 369.

In *Valspar*, a truck-bed lid manufacturer contracted to purchase paint from Valspar. Pre-contract testing revealed significant problems with both the application of the paint and color matches. Valspar assured the manufacturer that the problems would be resolved, and the parties entered into a contract. The problems observed during testing continued, and the manufacturer sued Valspar. 764 N.W.2d at 363. The district court dismissed the manufacturer's fraud claim as a matter of law. The supreme court affirmed, noting that the parties are "sophisticated business equals" and that the manufacturer had conducted its own pre-contract investigation. *Id.* at 369. The supreme court held that, "[w]hen a party conducts an independent factual investigation before it

enters into a commercial transaction, that party cannot later claim that it reasonably relied on the alleged misrepresentation." *Id.*; *see also Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 118-19, 149 N.W.2d 37, 39 (1967) (holding that reliance unjustified where a party makes an "independent inquiry as to the accuracy" of a representation, but that where the investigation is not "adequate to disclose the falsity of the representation," the misrepresenting party "cannot escape liability by claiming that the other party ought not to have trusted him").

Provell argues that the district court erred in granting summary judgment pursuant to *Valspar*. Provell asserts that its level of sophistication does not make its reliance on respondents' statements unreasonable, and that it engaged in only a "partial investigation" that did not produce the "mutually shared complete picture" present in *Valspar*. And Provell argues that the district court failed to consider whether respondents' representations were "calculated to deceive" a party of Provell's sophistication and relied on "hindsight bias" in concluding that the misrepresentations should have been obvious to Provell. *See, e.g.*, *Spiess*, 230 Minn. at 254, 41 N.W.2d at 567 (considering whether the representations were "reasonably calculated to deceive, not the average man, but a person of the capacity and experience of the particular individual who was the recipient of the representations").

Like *Valspar*, this case involves two sophisticated businesses. But we agree with Provell that the experience and sophistication of Provell and its principal do not, standing alone, make Provell's reliance unreasonable as a matter of law. Accordingly, we consider Provell's independent pre-contract investigation. As in *Valspar*, the record

reflects that the investigation Provell conducted prior to purchasing its membership revealed serious concerns about JetChoice II's ability to perform under the proposed contract. JetChoice II's financial statements revealed operating losses of $1.5 million as of September 30, 2008, with more than 80% of its assets consisting of a $9 million account receivable from JetChoice I, obviously linking the financial stability of the two JetChoice entities. Provell's CFO advised Richards that he could not express an opinion as to the financial stability of JetChoice II because its financial records were "incomplete" and that Richards needed to also obtain JetChoice I's financial statements. Despite Richards's requests for JetChoice I's financial statements, respondents refused to provide them, offering only Kloeber's personal financial information, which documented Kloeber's personal investment in JetChoice I. And the Dun & Bradstreet reports indicated several "slow pay" incidents. In short, Provell's independent investigation revealed information that challenged respondents' statements regarding the robust financial health of the JetChoice entities, the services Provell would receive, and Provell's ability to recover its lump-sum payment after three years.

Provell argues that the district court usurped the role of the jury because some of the representations on which Provell relied could not be independently verified. Provell points to Kloeber's personal financial statement and assurance that he would stand behind the companies' financial commitments, Overvig's misrepresentation of the number of member departures, and Overvig's statement that JetChoice II could shift operations to another provider if JetChoice I failed.

We are not persuaded. As the district court noted, the information that respondents provided, together with information omitted or withheld, indicated that the JetChoice entities were not financially stable, "[r]egardless of any questionable statements made by JetChoice company representatives[.]" Thus, notwithstanding any misrepresentations within Kloeber's assurances and personal financial information, or misrepresentations about the exodus of JetChoice members, Provell's due diligence revealed glaring problems that should have, and did, prompt concerns about the JetChoice entities' ability to perform under the proposed contract. As the district court stated, Provell "was aware that the financial situation . . . was less than sound, and decided to purchase a membership anyway." On this record, we discern no genuine fact issues regarding the reasonableness of Provell's reliance.

Accordingly, we conclude that this is one of those rare cases, like *Valspar*, where summary judgment is appropriate on the element of reasonable reliance. Because we affirm the judgment, we do not address the issues raised in respondents' related appeal.

Affirmed.