STATE OF MINNESOTA
IN COURT OF APPEALS
A11-681

River City Mortgage & Financial, LLC,
Appellant,

vs.

Old Republic National
Title Insurance Company, et al.,
Defendants,

New Millennium Title Group, LLC, et al.,
Respondents.

Filed December 12, 2011
Reversed and remanded
Klaphake, Judge

Hennepin County District Court
File No. No. 27-CV-10-2692

Wayne E. Gilbert, Eagan, Minnesota (for appellant)

Frederic W. Knaak, Knaak & Kantrud, P.A., Vadnais Heights, Minnesota (for respondents)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

KLAPHAKE, Judge

Appellant River City Mortgage & Financial, LLC, challenges the district court's order dismissing its complaint against respondents New Millennium Title Group, LLC,

Frank Griebenow, and Debra Stark for failure to state a claim upon which relief could be granted. Because of our stringent standard of review of a Minn. R. Civ. P. 12.02(e) dismissal, we conclude that appellant has set forth a minimally legally sufficient claim. We therefore reverse and remand for further proceedings.

D E C I S I O N

We review the legal sufficiency of a claim dismissed under rule 12.02(e) de novo. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). We must consider only the factual allegations set forth in the complaint and must accept those facts as true and construe all reasonable inferences in favor of the party against whom the motion to dismiss is brought. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). The reviewing court may not consider whether a party can prove the facts alleged; a rule 12.02(e) dismissal will not be upheld if it is possible "on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (quotation omitted). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr*, 788 N.W.2d at 80 (quotation omitted). But a party must plead more than "labels and conclusions"; the reviewing court is not bound by legal conclusions pleaded by the party. *Id.*

Despite the inordinate length of appellant's complaint, its theory of the case can be summarized succinctly: appellant alleges that respondents acted in a joint capacity with defendants Real Source Title (Real Source), John Povejsil, and Jason Fischer, to defraud

or mislead appellant into sending money to Real Source, rather than to respondents, thus permitting Fischer to embezzle the funds and denying appellant its sought-after title insurance policy. In short, all of the multiple claims against respondents are predicated on the assumption that respondents formed a joint venture, a joint enterprise, or some other agency relationship with defendant Real Source. If appellant has pleaded a legally sufficient claim of some joint action, this action must be permitted to continue. Because of the procedural posture of this matter, we are limited to a review of the pleadings, and we must accept the facts pleaded as true.

A joint enterprise requires "(1) a mutual understanding for a common purpose, and (2) a right to a voice in the direction and control of the means used to carry out the common purpose." *Mellett v. Fairview Health Servs.*, 634 N.W.2d 421, 424 (Minn. 2001) (quotation omitted). Four elements demonstrate proof of a joint venture: (1) each party makes a contribution of money, property, time, or skill to an enterprise; (2) the parties each have a proprietary interest and the right of mutual control over the enterprise; (3) the parties have an express or implied agreement to share profits, but not necessarily losses; and (4) the parties have an express or implied contract. *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 416 (Minn. App. 2008). "[A] joint venture or joint enterprise generally arises when necessary to impute negligence between two entities that otherwise have no legal relationship." *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286, 290 (Minn. App. 1997). A joint venture creates an agency relationship. *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 390 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). Because of the agency relationship, "[w]hen one participant in a joint enterprise

negligently causes an injury while acting within the scope of such enterprise, every participant is liable to the injured party." *Peterson v. Fortier*, 406 N.W.2d 563, 565 (Minn. App. 1987), *review denied* (Minn. July 31, 1987).

Appellant alleges that Real Source, having lost its ability to provide title insurance policies and closing services, agreed to work together with New Millennium to provide these services for Real Source's clients. This would be the "mutual understanding for a common purpose" required for a joint enterprise. *Mellett*, 634 N.W.2d at 424. Appellant also alleges that both parties agreed to "a right to a voice in the direction and control of the means used to carry it out." The right to direction or control means that a party has "the *legal right* to control the means used to carry out the common purpose." *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984). Thus, the complaint sets forth the bare bones elements of a joint enterprise. In Minnesota, "the pleading of broad general statements that may be conclusory is permitted. The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997).

As to the existence of a joint venture, appellant alleged that respondents and defendants

> contributed money, property, time or skill; exercised joint control and joint proprietorship; agreed that [they] would share profits from the sale of Title Insurance Services and Settlement Services; and conducted [the business] at all times pursuant to the express or implied contract that [appellant] refers to as the Work Share Agreement.

This is sufficient to give respondents fair notice of appellant's theory. *Id.* at 749. Taking appellant's allegations that New Millennium worked together with Real Source to provide title insurance and closing services by dividing the work among their employees, and that both received compensation for these services as true, we conclude that appellant has set forth a legally sufficient claim of joint venture.

"Agency" is a "fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions." *Black's Law Dictionary* 70 (9th ed. 2009). Appellant alleges that Real Source had implied or apparent authority to act on behalf of New Millennium. To have apparent authority, the following must be shown: (1) the principal must have held the agent out as having authority or acquiesced in his actions; (2) the proof of the agent's authority must be found in the principal's actions, not the agent's; and (3) the party dealing with the agent "must have actual knowledge that the agent was held out by the principal as having such authority." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988).

Although appellant's allegations of an agency relationship are limited, we must view this in the light most favorable to the nonmoving party. Appellant has pleaded that although most of the contract documents name New Millennium as the issuing party, Real Source sent out payment instructions under its name, instructing appellant to deposit the funds in Real Source's bank account. In at least one instance, these false instructions were not countermanded by correct instructions. This is sufficient to create a colorable claim of an agency relationship.

We will sustain a rule 12.02(e) dismissal only if it appears to a certainty that no facts exist to support the grant of the demanded relief. In the early stages of this action, before any discovery has been made, we conclude that appellant has set forth a legally sufficient claim for relief.

Reversed and remanded.