STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0864

ACCAP-HUD Homes Tax Credit
Limited Partnership, et al.,
Appellants,

vs.

Minnesota Counties Intergovernmental Trust,
Respondent.

Filed November 19, 2012
Affirmed
Cleary, Judge

Ramsey County District Court
File No. 62-CV-10-11253

John M. Colosimo, Adam J. Licari, Mitchell J. Brunfelt, Colosimo, Patchin, Kearney & Brunfelt, Ltd., Virginia, Minnesota (for appellants)

Scott T. Anderson, Timothy A. Sullivan, Scott E. Schraut, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Cleary, Judge.

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

CLEARY, Judge

Appellants challenge the summary-judgment dismissal of their claims arising out of the termination of their membership in respondent, a self-insurance pool. Appellants argue that genuine issues of material fact preclude summary judgment on their claim of

breach of fiduciary duty and claim for a constructive trust or equitable lien. Because there are no genuine issues of material fact and respondent is entitled to judgment as a matter of law, we affirm.

FACTS

Pursuant to Minn. Stat. § 471.981, subds. 1, 2 (2010), a political subdivision may self-insure against liabilities, risks, or hazards, and may establish a self-insurance revolving fund from which to pay for losses, costs of defense and investigation, premiums and deductibles when commercial insurance is purchased, debt-related expenses, costs of loss-control activities, and any other costs customarily borne by commercial insurers. Two or more political subdivisions may establish a self-insurance pool. *Id.*, subd. 3 (2010). Under Minn. Stat. § 471.59, subd. 1 (2010), "Two or more governmental units, by agreement entered into through action of their governing bodies, may jointly or cooperatively exercise any power common to the contracting parties or any similar powers . . . ."

Respondent Minnesota Counties Intergovernmental Trust is a self-insurance pool created pursuant to Minn. Stat. §§ 471.59, .981 (2010). Respondent is operated and administered under bylaws, which state that the purpose of respondent is to establish a mechanism whereby its members may jointly develop and administer a risk management program, prevent or lessen the frequency and severity of losses occurring in the operation of member functions, defend and protect members against liability or loss, and provide services as determined by its board of directors (board).

The bylaws contain provisions regarding the selection and powers of the board and state:

> The [b]oard may impose such conditions on membership as it deems appropriate to protect the interests of [respondent] and to provide for the benefit of its [m]embers . . . . The [b]oard, at its discretion, may create, modify or abolish classes, levels or types of membership within [respondent] with differing [m]ember rights, privileges or obligations.

The board has the power to "determine loss of membership qualification" and to "[t]erminate membership of any [m]ember that does not qualify for participation."

The bylaws also contain provisions regarding the admission and obligations of members. Membership in respondent is open to any governmental unit or political subdivision, as well as any "other entity that is determined by the [b]oard to qualify for membership" and that is included in the definition of a "municipality" under Minn. Stat. § 466.01, subd. 1 (2010). Members are divided into "classes of membership." Entities enter into or agree to comply with a joint-powers agreement upon becoming members of respondent.

Members must appropriate for and promptly pay "all annual and supplementary or other payments to [respondent] at such times and in such amounts as established by the [b]oard." The bylaws refer to these payments as "contributions" and provide that all contributions are to be put into a trust fund. The fund may be used for excess insurance, reinsurance, payment of losses, administrative expenses, mandated contributions to state funds, and other expenses that the board deems appropriate for the establishment and administration of respondent. In the event that trust assets "are determined to be more

than sufficient to meet liabilities and maintain prudent reserves," surplus assets may be returned to members, credited toward future member contributions, or otherwise utilized as determined by the board.

Pursuant to both the bylaws and the joint-powers agreement, a member that ceases to qualify for participation in respondent or terminates its participation has no right or claim to the reserves or other holdings of respondent. A withdrawing member may be entitled to a share of respondent's assets only if the board deems it appropriate. The withdrawal of a member does not affect the continuance of respondent or any division of respondent. Also pursuant to both the bylaws and the joint-powers agreement, the joint-powers agreement remains in effect until terminated by mutual consent of the members, suspended or superseded by a subsequent agreement between the members, or terminated by operation of law.

Appellants are 13 community-action agencies and 4 limited partnerships in which a community-action agency is the sole general partner. The definition of a "municipality" under Minn. Stat. § 466.01, subd. 1, includes a "community action agency, or a limited partnership in which a community action agency is the sole general partner." Appellants became members of respondent at various times, each signing an agreement or resolution and accepting the joint-powers agreement.

In July 2009, an actuarial advisor reported to the board that "community action agencies have higher loss experience than other member types in property/casualty and significantly higher loss experience than other member types in workers' compensation." At subsequent meetings, the board reviewed appellants' contributions and losses, whether

to continue appellants' membership, and whether appellants' membership was adversely impacting other members of respondent. At its meeting in June 2010, the board voted not to renew appellants' membership effective January 1, 2011. The board determined that the assets of its other 430+ members were being used to subsidize appellants' activities and that "a great deal of work" would be needed to remedy this, which would further divert resources from the other members. Appellants appealed the board's decision, and the board held a special meeting in August 2010, after which it affirmed its decision to "abolish[] the membership class of community action agencies including limited liability partnerships effective January 1, 2011 because it is in the best interest of [respondent] and provides for the benefit of its members."

Appellants filed a complaint alleging breach of fiduciary duty and seeking injunctive and declaratory relief and estoppel. Following a temporary injunction hearing, the district court issued an order enjoining respondent from terminating appellants' participation in its property/casualty and workers' compensation divisions until the end of the 2011 program year because appellants had previously received notice that their participation in those divisions would be renewed. However, the court denied appellants' request that respondent be enjoined from abolishing appellants' class of membership, stating that it was within the board's authority under the bylaws to abolish membership classes.

The parties subsequently stipulated that appellants' "membership class in [respondent] can and is to be considered to be abolished effective 12:00 midnight on December 31, 2011." Appellants then filed an amended complaint that stated,

"[Appellants] have agreed to terminate their membership in [respondent's] group insurance pool effective at the year-end of 2011." The amended complaint alleged breach of fiduciary duty and unjust enrichment and sought estoppel and a constructive trust or equitable lien. Appellants later dismissed their claim based on the theory of promissory estoppel.

Respondent moved for summary judgment on appellants' remaining claims, and the district court issued an order granting summary judgment on all claims. The court granted summary judgment on appellants' unjust-enrichment claim, stating that appellants had offered no evidence to show that respondent has been unjustly enriched or that they are entitled to a return of funds, while respondent had shown that appellants received coverage in exchange for their contributions. As a result, the court declined to impose a constructive trust or equitable lien, stating that they are remedies used to prevent unjust enrichment. The court also granted summary judgment on appellants' breach-of-fiduciary-duty claim, stating that there had been no breach because the board had the authority to terminate appellants' membership and had made a decision in the best interests of respondent's members when doing so.

This appeal followed. Appellants seek review of their breach-of-fiduciary-duty, constructive-trust, and equitable-lien claims, but do not appeal the grant of summary judgment on their unjust-enrichment claim.

D E C I S I O N

A summary-judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The role of an appellate

court when reviewing a grant of summary judgment "is to determine whether there are any genuine issues of material fact and whether the [district] court erred in its application of the law." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). The reviewing court may not weigh the evidence or make factual determinations, but must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The party moving for summary judgment has the burden to show that summary judgment is appropriate. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

However, a party opposing summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "A nonmoving party cannot defeat a summary judgment

motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

Appellants argue that the district court erred by granting summary judgment on their breach-of-fiduciary-duty claim because there are genuine issues of material fact regarding whether a fiduciary relationship existed between the parties and whether respondent breached its fiduciary duty. The elements of a breach-of-fiduciary-duty claim are the same as those of a claim of negligence. *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989), *review denied* (Minn. Nov. 15, 1989). That is, a plaintiff alleging breach of fiduciary duty must demonstrate the existence of a fiduciary duty, a breach of that duty, causation, and damages. *See Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982) (stating the elements of negligence).

"A fiduciary relationship is characterized by a 'fiduciary' who enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence." *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 330–31 (Minn. App. 2007) (citing *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985)), *review denied* (Minn. Aug. 21, 2007). "Minnesota law imposes on a fiduciary the highest obligation of good faith, loyalty, fidelity, fair dealing, and full disclosure of material matters affecting the client's interests." *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 779 (Minn. App. 2006). "[W]hether a person owes a fiduciary duty to another person typically is determined by the relationship between the two persons." *Thomas B. Olson & Assocs., P.A., v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 914 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009).

The parties dispute whether respondent owed a fiduciary duty to appellants. Whether a fiduciary relationship existed is a question of fact, which typically is inappropriate for determination at the summary-judgment stage. *See Toombs*, 361 N.W.2d at 809 ("The existence of a fiduciary relationship is a question of fact."); *May v. First Nat'l Bank of Grand Forks, N.D.*, 427 N.W.2d 285, 289–90 (Minn. App. 1988) (reversing a grant of summary judgment and remanding for trial on the issue of whether a fiduciary relationship existed between the parties), *review denied* (Minn. Oct. 26, 1988). However, even if the evidence is considered in the light most favorable to appellants and it is accepted that a fiduciary relationship did exist between the parties, appellants have not presented specific facts showing that there is a genuine issue regarding whether respondent breached the alleged fiduciary duty or whether they sustained damages.

I. Breach of Fiduciary Duty

Appellants admit that the board had the authority under the bylaws to abolish their membership class, disqualify them from membership, and terminate their membership. But appellants argue that respondent breached its fiduciary duty after doing so by improperly retaining funds to which they are entitled. "Whether a fiduciary duty has been breached generally is a question of fact." *Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 367 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). However, appellants have not presented specific facts showing that there is a genuine issue for trial regarding whether respondent breached its fiduciary duty.

According to both the bylaws and the joint-powers agreement, a member that ceases to qualify for participation in respondent or terminates its participation has no

right or claim to the reserves or other holdings of respondent. Under the explicit language of the bylaws and the joint-powers agreement, appellants are not entitled to a return of funds.

Appellants claim that they are entitled to some share of trust assets because the joint-powers agreement terminated when their membership class was abolished. According to both the bylaws and the joint-powers agreement, the joint-powers agreement remains in effect until terminated by mutual consent of the members, suspended or superseded by a subsequent agreement between the members, or terminated by operation of law. Appellants apparently believe that the abolishment of their membership class terminated the joint-powers agreement "by operation of law." They claim that there is not one joint-powers agreement, but multiple agreements between all of respondent's members, and that the agreements that they were a part of must have terminated when their membership class was abolished. However, nothing in the record indicates that there are multiple joint-powers agreements in existence. The bylaws define "[a]greement" as "the joint powers self-insurance agreement entered into by [m]embers" and refer to a singular "[a]greement" throughout.

Even if we were to accept the argument that multiple joint-powers agreements exist between respondent's members and that some joint-powers agreements terminated when appellants' membership class was abolished, it does not follow that appellants are entitled to a share of trust assets. Appellants argue that the purposes of their joint-powers agreements were completed when their membership class was abolished, such that they must now be entitled to a return of funds, and cite Minn. Stat. § 471.59, subd. 5, which

states: "Such agreement shall provide for the disposition of any property acquired as the result of such joint or cooperative exercise of powers, and the return of any surplus moneys in proportion to contributions of the several contracting parties after the purpose of the agreement has been completed." Appellants argue that the joint-powers agreements are deficient because they do not provide for the disposition of property and return of surplus money when their purposes have been completed. However, even if appellants' argument that the joint-powers agreements are not in compliance with the statute is accepted, that noncompliance does not give rise to a cause of action against respondent. *See Lickteig v. Kolar*, 782 N.W.2d 810, 814 (Minn. 2010) ("[A] statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication.") (quotation and citation omitted). Appellants have not presented specific facts showing that there is a genuine issue regarding whether respondent breached its fiduciary duty by improperly retaining funds to which appellants are entitled.[1]

II. Damages

Even if appellants had raised a genuine issue regarding whether respondent breached its fiduciary duty, they have not presented specific facts showing that there is a genuine issue regarding whether they sustained damages. A plaintiff must demonstrate with reasonable certainty the nature of injuries sustained. *Canada by Landy v. McCarthy*,

[1] Appellants also maintain that respondent breached its fiduciary duty by "treat[ing] similarly situated members differently" and by treating appellants as "second-rate members." However, the bylaws give the board the discretion to create "classes, levels or types of membership within [respondent] with differing [m]ember rights, privileges or obligations."

567 N.W.2d 496, 507 (Minn. 1997). "[S]peculative, remote, or conjectural damages are not recoverable." *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980).

Appellants have presented no evidence of damages that they suffered or an amount of funds that should be returned to them. Appellants cite the increase in respondent's assets during the time they were members to argue that they must be entitled to a return of some amount of funds, but they do not explain how any increase is attributable to them or why they are entitled to a return of assets. According to the bylaws, in the event that trust assets "are determined to be more than sufficient to meet liabilities and maintain prudent reserves, such surplus assets may be returned to [m]embers; credited toward future annual payments or otherwise utilized in accordance with guidelines adopted by the [b]oard." Under the bylaws, the board has the authority to determine whether to return surplus assets to members.

Additionally, the record contains a report by an actuarial advisor that tracks appellants' contributions and the benefits that they received. This report shows that appellants received benefits in excess of the contributions that they made while they were members of respondent. As the district court stated, appellants "offer no evidence to refute this calculation that [they] received coverage in exchange for their payments." Appellants argue that they did not have evidence to refute the actuarial advisor's calculation because they did not have a chance to finish discovery and are missing necessary records. However, the district court denied appellants' motion to continue discovery, and that decision has not been appealed. Appellants claim that they will be

able to prove damages at trial, but promises to produce evidence at trial are insufficient to create a genuine issue of material fact. *See Nicollet Restoration*, 533 N.W.2d at 848.

Because appellants have not presented specific facts showing that there is a genuine issue regarding whether respondent breached a fiduciary duty or whether they sustained damages, and because respondent is entitled to judgment as a matter of law, the district court did not err by granting summary judgment on the breach-of-fiduciary-duty claim.[2]

Affirmed.

[2] Appellants also argue that the district court erred by declining to impose a constructive trust or equitable lien. Constructive trusts and equitable liens are remedies, not causes of action themselves. *See Wright v. Wright*, 311 N.W.2d 484, 485 (Minn. 1981) ("[A] constructive trust is a judicially created equitable remedy imposed to prevent unjust enrichment of a person holding property under a duty to convey it or use it for a specific purpose."); *Fredin v. Farmers State Bank of Mountain Lake*, 384 N.W.2d 532, 535 (Minn. App. 1986) ("An equitable lien arises in an equity proceeding when a person is allowed to reach the property of another and hold it as security for a claim on the ground that otherwise the latter would be unjustly enriched."). Because the district court did not err by granting summary judgment on appellants' breach-of-fiduciary-duty claim, it did not err by declining to impose a constructive trust or equitable lien as a remedy for a breach.