STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0451

Rebecca J. Adams, et al.,
Appellants,

Little Red House Investments, LLC, et al.,
Plaintiffs,

vs.

Thomas Rosensteel,
Respondent.

Filed December 2, 2013
Affirmed
Chutich, Judge

Hennepin County District Court
File No. 27-CV-12-12595

Christopher P. Parrington, Shawn M. Dobbins, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for appellants)

Joseph A. Wentzell, James W. Moen, Wentzell Law Office, PLLC, St. Anthony, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

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

CHUTICH, Judge

In this action arising out of failed real estate investments, appellants challenge the district court's dismissal of their claims of fraud, negligent misrepresentation, promissory estoppel, and consumer fraud against respondent Thomas Rosensteel. Because the complaint does not allege facts that, if true, allow appellants to prevail and because appellants did not ask the district court for leave to amend the complaint, we affirm the district court's dismissal with prejudice of their claims.

FACTS

Between 2007 and 2009, appellants Rebecca J. Adams, Brent W. Adams, Adams at Work Incorporated, John Crudele, JC Recreational Properties, LLC, Bruce W. Helmer, Laura A. O'Halloran Helmer, LBAG Investment Group, LLC, Paul J. Rampetsreiter, Lara D. Rampetsreiter, and Ramp Recreational, LLC, bought condominiums at Giant's Ridge Resort in Biwabik from James Koch, a real estate developer. Koch marketed condominium units at Giant's Ridge Resort through Split Rock Realty. Respondent Thomas Rosensteel worked for Koch as a real estate broker. Rosensteel was a licensed real estate broker until approximately August 24, 2009, when his license was permanently revoked retroactive to June 11, 2008.

On September 21, 2011, appellants and others served a complaint in a companion case against Koch, a bank, respondent Rosensteel, and various other defendants. After Rosensteel successfully received an order for discharge in separate bankruptcy proceedings, he was dismissed from the companion case by stipulation. Notwithstanding

the bankruptcy, in June 2012, appellants filed the complaint underlying this appeal against Rosensteel alone. This complaint is almost identical to the complaint in the companion case and alleges fraud, negligent misrepresentation, consumer fraud, deceptive trade practices, violation of the Minnesota Securities Act, promissory estoppel, unjust enrichment, negligence, and quantum meruit. The complaint also seeks attorney's fees, a determination of discharge of debts, and declaratory relief (liquidation of the amount of the plaintiffs' claims against Rosensteel). The claims for unjust enrichment, negligence, and quantum meruit were dismissed by stipulation in October 2012, and are not at issue here. Nor do appellants appeal the district court's dismissal of their claims for deceptive trade practices, Minnesota Securities Act, attorney's fees, determination of discharge of debts, and declaratory relief.

According to the complaint, Koch marketed the condominiums to potential buyers as an investment property. Under Koch's plan, a purchaser would buy one or more units and receive a mortgage loan that required only payment of interest for approximately three years with a balloon payment due at the end of the period. For the first 18 months, and on a month-to-month basis thereafter, the purchasers would lease their units to Wayzata Hospitality Group, a business in which Koch owned a controlling interest. The plan further provided that these lease payments would cover the monthly mortgage payments, and Koch projected that the purchasers would make a profit during this time period. At the end of the lease period, the purchasers could either fractionalize their unit as a time share or sell it before the balloon payment came due.

While Rosensteel was working to sell condominiums within Giant's Ridge Resort as one of Koch's real estate brokers, he had contact with several appellants. Appellants allege that Rosensteel made false statements and intentional omissions to convince them to buy units on the property. Rosensteel allegedly told appellant John Crudele that by purchasing five units, he would see a 12-percent return on his investment. Rosensteel explained to Crudele and appellant Paul Rampetsreiter that the unit they were interested in had an annual cash-flow of $60,000; in reality the unit realized $25,132 in annual cash flow in 2009 and $41,491 in 2010.

The complaint further alleges that Rosensteel told appellants Bruce and Laura Helmer that they would instantly see a 16-percent return on their investment, 60-percent occupancy was the break-even point, the property taxes would not drastically increase, and they would not have to pay out-of-pocket to make their mortgage payment because of the "lease back" program. Rosensteel also allegedly told several appellants that American Bank of the North was the only bank available for financing and that their investments would be safe. Appellants allege that Rosensteel did not tell them that Giant's Ridge Resort owed back taxes to St. Louis County, the resort had been mismanaged before Koch purchased the property, and Koch, Split Rock Realty, and American Bank of the North had a pre-existing business relationship.

In September 2012, Rosensteel moved to dismiss the case, and appellants did not respond to the motion. A hearing on the motion to dismiss was held, and appellants claimed at the hearing that they were not served with the motion. Court records show,

however, that appellants' counsel was properly served with the motion.[1] Appellants did not ask the district court for leave to amend the complaint or for more time to respond to Rosensteel's motion. In December 2012, the district court granted Rosensteel's motion to dismiss with prejudice, and judgment was entered for Rosensteel. This appeal followed.

D E C I S I O N

I. Dismissal under Minnesota Rule of Civil Procedure 12.02(e)

We "review de novo the district court's grant of a motion to dismiss under Minn. R. Civ. P. 12.02(e). In so doing, we consider only the facts alleged in the complaint, accepting those facts as true." *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013) (quotation and citation omitted). Appellants do not have to prove the facts alleged in the complaint, *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000), and we cannot look outside of the pleadings to assess the sufficiency of the claims. *N. States Power Co. v. Franklin*, 265 Minn. 391, 396, 122 N.W.2d 26, 29 (Minn. 1963). "[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 requested." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted). Legal conclusions and labels in the complaint are neither binding on this court's review nor sufficient to survive a Rule 12.02(e) motion. *Id.*

[1] Another motion to dismiss was filed simultaneously by a defendant on the companion case stemming out of the same set of facts with the same plaintiffs and lawyers. Appellants' counsel responded to that motion, but did not respond to the motion at issue in this case. Court records indicate that both motions were received by appellants' counsel at the same time.

A. Claims of Fraud and Negligent Misrepresentation

Appellants contend that the district court erred as a matter of law by dismissing their fraud and negligent misrepresentation claims because "the Complaint makes *specific and particular* reference to Rosensteel's false representations of a past or existing material fact" that were used to induce them to invest in Giant Ridge Resort, resulting in their pecuniary damages. Appellants also claim that Rosensteel had a fiduciary relationship with them and had a duty to disclose relevant and accurate information to them. Rosensteel argues, by contrast, that the district court's ruling should stand because the relevant pleading requirements were not satisfied and he did not have a fiduciary relationship with appellants. We affirm the district court's dismissal of these claims.

Under Minnesota Rule of Civil Procedure 9.02, the complaint must state the circumstances underlying claims of fraud or negligent misrepresentation "with particularity." *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 618–19 (Minn. App. 1985) (quotation omitted). When pleading fraud, the plaintiff must "include such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995) (quotation omitted).[2] Claims that lack sufficient particularity under rule 9.02 fail as a matter of law and can be dismissed under rule 12.02(e). *Martens*, 616 N.W.2d at 747–48.

[2] The Minnesota Supreme Court has held that federal case law can be "instructive" where "the relevant language of the state and federal rules is identical." *DLH, Inc v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The relevant portions of Minn. R. Civ. P. 9.02 and Fed. R. Civ. P. 9(b) state that claims of fraud must be stated "with particularity."

To prove a fraud claim, a plaintiff must show

> (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 action in reliance thereon; (4) that the representation caused action in reliance thereon; and (5) pecuniary damages as a result of the reliance.

U.S. Bank N.A. v. Cold Spring Granite Co., 802 N.W.2d 363, 373 (Minn. 2011). Opinions or statements that are "general and indefinite" are not representations of fact. *Martens*, 616 N.W.2d at 747 (quotation omitted). Similarly, representations regarding future income are not actionable unless they fail to "accurately reflect surrounding past and present circumstances." *Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 615 (Minn. 1980).

In addition, the claimed reliance on any allegedly fraudulent statement must be actual and reasonable. *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320–21 (Minn. 2007). Omissions or nondisclosures may be fraudulent, but only when the person failing to speak had a duty to disclose certain information. *Hurley v. TCF Banking & Sav., F.A.*, 414 N.W.2d 584, 587 (Minn. App. 1987).

Negligent misrepresentation has the same elements as fraud, except it does not have an intent element. *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). Negligent misrepresentation requires that the person making the misrepresentation owes a duty of care to the person to whom the information is provided. *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App. 2000). A duty of care arises when the person making representations is either "supplying information for the guidance of others

in the course of a transaction in which one has a pecuniary interest, or in the course of one's business, profession or employment." *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 870 (Minn. App. 1995). No such duty is imposed when there is an arm's length transaction involving adversarial parties. *Smith*, 605 N.W.2d at 424.

The district court dismissed appellants' claims for fraud and negligent misrepresentation because they were "not stated with particularity." Specifically, the district court stated that "the paragraphs of the Complaint cited by Plaintiffs to support their claim of fraud against Rosensteel . . . do not relate to the claims being made and/or the specific person making those claims."

The district court noted that the plaintiffs all had meetings with Koch and Rosensteel before deciding to buy their units, and that, during these meetings, they received, among other things, information concerning the "Master Plan" for Giant's Ridge Lodge; future planned amenities and buildings; the perks of the 18-month lease program; and projections concerning future costs and the value of the units. The district court found that it is "impossible to tell from the Complaint who made certain statements, what precisely was said, what statements were false, and the statements that Plaintiffs relied upon in purchasing their units."

In addition, the district court found that the complaint had "no allegation regarding Rosensteel's state of knowledge in making representations." Concerning the claims alleging mismanagement after appellants bought their units, the district court found that no evidence showed that Rosensteel had any responsibility in managing the resort.

Lastly, the district court held that "there is no evidence that Rosensteel owed Plaintiffs a duty to disclose" the omissions alleged in the complaint.

After carefully reviewing the allegations of the complaint, we agree with the district court's findings on these elements of fraud and negligent misrepresentation. A large part of appellants' complaint discusses the behavior of other realtors, the bank that provided financing, and Koch and his related entities—actions that are not pertinent to the claims against Rosensteel. When the complaint does mention Rosensteel, it fails to allege that he knew that any specific statement that he made was false or that it was relied upon by appellants in deciding to buy a unit.

In addition, we agree with the district court that Rosensteel had no fiduciary duty to disclose to appellants any of the omissions that they allege affected their decisions to buy units. Citing *Kratzer v. Welsh Cos.*, appellants claim that Rosensteel owed a duty to them as a real estate broker. 771 N.W.2d 14, 18 (Minn. 2009). But *Kratzer* describes how the real estate broker has a fiduciary relationship with the person or entity on whose behalf they are working. *Id.* As stated in the complaint, Rosensteel did not work for appellants; instead, he worked as a real estate broker for the owners of the condominiums at Giant's Ridge Resort and was paid a commission by the owners upon the sale of those condominiums to appellants. Any fiduciary duty Rosensteel had was to his clients, not to appellants. *See White v. Boucher*, 322 N.W.2d 560, 564–65 (Minn. 1982). That Rosensteel was acquainted with some of the appellants does not give rise to a fiduciary relationship. *See Kennedy v. Flo-Tronics, Inc.*, 274 Minn. 327, 331, 143 N.W.2d 827, 830 (1966).

Because the duty to disclose arises from the real estate broker's duty of good faith and loyalty to the principal, we affirm the district court's ruling that Rosensteel had no fiduciary duty to appellants. The district court's dismissal of the fraud and negligent misrepresentation claims was proper.

B. Promissory Estoppel Claim

The district court ruled that appellants did not properly plead facts that would give rise to a promissory estoppel claim because they "cite paragraphs in the Complaint that do not exist"[3] and "there is no allegation that Rosensteel made any clear or definite promise to the Plaintiffs, or that any such promise resulted in detrimental reliance." Appellants now challenge this finding.

Promissory estoppel "requires proof that 1) a clear and definite promise was made, 2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and 3) the promise must be enforced to prevent injustice." *Martens*, 616 N.W.2d at 746. "[T]he doctrine of promissory estoppel only applies where no contract exists." *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995).

We conclude that appellants have failed to allege a viable claim of promissory estoppel. First, Appellants entered into a written contract to purchase their units at Giant's Ridge, so promissory estoppel is not applicable. *See id.* Second, even if the doctrine applied here, none of the paragraphs in the complaint allege any promise by Rosensteel to perform in the future. The complaint simply alleges that Rosensteel told

[3] The complaint contained typographical errors and referred to paragraphs with numbers higher than those actually contained in the complaint.

them his opinions on what the benefits of investing in Giant's Ridge would be. Because appellants did not plead facts that would give rise to promissory estoppel, we affirm the district court's dismissal of the claim.

C. Consumer Fraud Claim

Appellants contend that the district court improperly ruled that their consumer fraud claim did not benefit the public. Rosensteel maintains that the district court correctly found that nothing in the record shows that a class of consumers would benefit from appellants' claim. Because we conclude that no allegations in the complaint contend that Rosensteel was advertising or making representations to the public at large, we affirm the district court's dismissal of this claim.

The Minnesota Prevention of Consumer Fraud Act creates a cause of action for "[t]he 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." Minn. Stat. § 325F.69, subd. 1 (2012). To bring a civil cause of action under the Consumer Fraud Act, the plaintiff must act as a private attorney general under Minnesota Statutes section 8.31, subdivision 3(a).

The Consumer Fraud Act "applies only to those claimants who demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 313–14 (Minn. 2000). A claim benefits the public when the defendant "presented its program to

the public at large." *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 330 (Minn. 2003).

The district court dismissed appellants' claim on this issue because "[a]ccording to the Complaint, all Plaintiffs either approached Rosensteel for advice and/or were a friend, or referred from a friend. There is no evidence that Rosensteel was making representations concerning the [resort] to the public at large."

Citing *Nystrom*, appellants claim that the Consumer Fraud Act should apply to their transactions. Appellants' reliance on *Nystrom* is unavailing, however, because the case holds that a claim "has no public benefit" when it is redressing "a single one-on-one transaction" where the respondent made no attempt to reach the general public. 615 N.W.2d at 314; *see also Collins*, 655 N.W.2d at 329–30 (summarizing *Nystrom*). As the complaint alleges, appellants became acquainted with Koch and Rosensteel through private contacts, and their claims of fraud relate to private contracts. Appellants have not shown that their claim against Rosensteel would benefit a class of consumers or the general public. Accordingly, we affirm the district court's decision to dismiss the Consumer Fraud Act claim.

II. Leave to Amend the Complaint

We typically review a district court's decision not to grant a party leave to amend a complaint for abuse of discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Under Minnesota Rule of Civil Procedure 15.01, a party may amend its complaint after a responsive pleading is filed if the party obtains leave of the court. Here, however, nothing in the record suggests that appellants ever asked the district court for leave to

amend the complaint, and we generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Citing federal case law, appellants assert that "the District Court should have granted them an opportunity to amend the Complaint." In all of the cited authorities, however, plaintiffs actually made a request to the trial court to amend the complaint. Appellants did not ask the district court to amend the complaint or move to vacate the judgment. Because the district court did not have the opportunity to consider whether to grant appellants leave to amend their complaint, it did not exercise its discretion, let alone abuse it.

Affirmed.