STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0533

Daniel C. Conklin,
Appellant,

vs.

ETOC Company, Inc., a Minnesota Corporation,
Respondent,

and

Grand View Vacation Properties, LLC,
Respondent.

Filed September 9, 2013
Affirmed
Peterson, Judge

Crow Wing County District Court
File No. 18-CV-12-592

Sarah R. Jewell, John R. Koch, Reichert Wenner, P.A., St. Cloud, Minnesota (for appellant)

James M. Gammello, Thomas C. Pearson, Daniel M. Hawley, Gammello, Qualley, Pearson & Mallak, PLLC, Baxter, Minnesota (for respondent ETOC Company)

William L. Davdison, Ryan P. Myers, Lind Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent Grand View Vacation Properties)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Klaphake, Judge.*

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

PETERSON, Judge

Appellant challenges the summary judgment granted to respondents on his fraudulent-misrepresentation and breach-of-contract claims. Because appellant failed to make a showing sufficient to establish a genuine issue for trial, we affirm.

FACTS

In July 2008, appellant Daniel C. Conklin purchased an approximately 4.4-acre parcel of property with 365 feet of lakeshore on Round Lake in Crow Wing County from respondent ETOC Company, Inc., which had listed the property for sale with respondent Grand View Vacation Properties, LLC (Grand View). Appellant learned about the property from his real estate agent, Pat Heinen, who told appellant that the property represented a good investment. Heinen knew that appellant had sold a commercial building and that he was looking for an investment venture. Appellant and Heinen inspected the property on June 7, 2008, and found that it was heavily wooded, with some rough terrain near the water, and that there were some dead reeds from the previous year in the lake within 20 feet of the shore. Appellant and Heinen walked along the shoreline and saw that the water was "clear and smooth" beyond the reeds and there was sparse evidence of vegetation growth. The following day, appellant and his wife and Heinen

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

stood on a neighboring property owner's dock on the west side of the property and looked into the lake and could see sand on the lake bottom. Heinen lived on Round Lake and told appellant that the lake in front of her property had a sand bottom. Heinen also told appellant that the detail sheet for the Multiple Listing Service (MLS) listing for the property stated that the lake in front of the property had a sand bottom. The listing, however, described the lake bottom as "Sand Soft." And at the bottom of the listing, there was a disclaimer that said, "Verify the accuracy of this information before relying on it." There is no evidence that appellant saw the MLS listing; all that he knew about the listing is what Heinen told him about it.

On Heinen's advice, appellant offered the full asking price for the property, and his offer was accepted on June 10. The offer was contingent on it being possible to split the parcel into three buildable lots with driveway access. ETOC was required to provide a certificate of survey showing the property divided into three lots, each with its own property identification number and legal description. Grand View hired Landecker & Associates, Inc. to prepare a survey and plat the property. Appellant filed a preliminary plat application before the closing date. The application included a lake survey prepared by Landecker, which reported about the lake in front of the property that the "bottom substrate consisted of sand and few cobbles from shore to a depth of 7.0 feet of water. From 7.0 to 10.0 feet of water the bottom substrate transitions to silty sand." The survey described the types of aquatic vegetation growing in those locations and noted that recent precipitation levels had been normal, and the survey included a wetland location map that showed significant wetlands on the lakefront.

Before the closing, appellant attended the first planning-commission hearing where the plat application was considered, and he described the hearing as "perfunctory." At the hearing, appellant noted that a strip of property near the lakeshore was designated as wetlands, which "concerned" him, but an unnamed person told him that "this would not impair access to the lake and therefore would not affect property values."

Appellant closed on the land purchase on July 25, 2008, and received a warranty deed; a corrective warranty deed was filed in October 2008 to correct errors in the legal description of the property conveyed. The legal descriptions in both the original deed and the corrective deed describe the western boundary of the property as "the West line of said Government Lot 1." A final plat of the property divided into three lots with driveway access and called Lendee First Addition was filed in November 2008.

In 2009, appellant spent some time clearing brush from the property. In 2010, he attempted to clear vegetation from the lake and discovered that the lake bottom was "dense muck and mud." The only area of sandy bottom that he discovered was on a 40-foot strip of land at the western edge of the property.

Appellant sued ETOC and Grand View, alleging misrepresentation and breach of contract. Respondents moved for a more definite statement; appellant served an amended complaint alleging fraudulent misrepresentation and breach of contract. The district court granted respondents' motion for summary judgment on January 18, 2013. This appeal followed.

D E C I S I O N

Summary judgment is appropriate when the record shows "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. We review the district court's grant of summary judgment de novo, to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 627 (Minn. 2012). A party opposing summary judgment may not rest on "mere averments or denials . . . but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

I.

On a claim for fraudulent misrepresentation, a plaintiff must show that

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted). "In defending a motion for summary judgment, the nonmoving party must come forward with some evidence demonstrating a genuine issue as to the actual reliance and the reasonableness of the reliance." *Id.* at 321. A party is not

obligated to investigate and may rely on a representation, so long as he does not know it is false and it is not obviously false. *Id.* The district court concluded that appellant's reliance on respondents' representation about the lake bottom was not reasonable as a matter of law. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 369 (Minn. 2009) (stating that if a party conducts an independent investigation before entering into a commercial transaction, he cannot later claim that it was reasonable to rely on a misrepresentation and directing district court to evaluate whether reliance was reasonable based on "the aggrieved party's intelligence, experience, and opportunity to investigate the facts at issue"). We will not address whether any reliance was reasonable because we conclude that the evidence does not create a fact issue as to actual reliance.

Appellant alleged that respondents fraudulently misrepresented that the lakeshore bottom in front of the property he bought was sand. The representation in the MLS listing was the only representation that respondents made regarding the lake bottom. That representation was that the lake bottom was "Sand Soft," not simply that the bottom was sand. And the representation included a disclaimer that said, "Verify the accuracy of this information before relying on it." Appellant has not alleged that he saw the listing, and there is no evidence that the complete representation in the listing was communicated to appellant; instead, appellant alleged that his real estate agent told him that the listing described the lake bottom as "sand." The agent also told appellant that the lake bottom at her home on Round Lake was sand. And appellant personally viewed the property, walked along the lakefront, and stood on a neighbor's dock to view the lake bottom.

There is no evidence in the record that appellant ever saw the representation that respondents made or that he ever learned the complete content of the representation. And there is no evidence in the record that when appellant purchased the property, he acted in reliance on the representation in the MLS listing, rather than on the information he obtained from his real estate agent and from his own inspection of the property. Because appellant has failed to present sufficient evidence to create a fact issue as to actual reliance on respondents' representation about the lake bottom, his fraudulent-misrepresentation claim fails.

II.

A breach-of-contract claim requires proof of (1) a contract, (2) performance of any conditions precedent by the party alleging the breach, and (3) breach of the terms of the contract by the other party. *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). The issue here is whether appellant has made a showing sufficient to create a fact issue as to whether respondents breached the terms of the purchase agreement.

Appellant's amended complaint alleges that "Lendee First Addition does not contain all of the lakeshore frontage extending from Lendee Addition on its east side to Kimball Addition on its west side, but omits approximately 40 feet of lake frontage adjacent to Kimball Addition." On appeal, appellant argues:

> Respondents provided appellant with an erroneous survey which omitted over forty feet of lakeshore and omitted a strip of land along the west side of the property, which was not what it held out was for sale in the marketing materials. . . .

> The survey respondents commissioned did not provide the same amount of land as was contemplated in the purchase agreement.

Appellant does not cite any document in the record that he contends was the erroneous survey that respondents provided, and we have not found any document in the record that appears to be a survey.[1] But the attachments to appellant's amended complaint include copies of the final plats of Kimball Addition and Lendee First Addition. These plats show that the eastern boundary of Kimball Addition is the east line of government lot 2 and the western boundary of Lendee First Addition is the west line of government lot 1, which means that the two additions are adjacent to one another on opposite sides of the dividing line between government lots 1 and 2; there is no land adjacent to Kimball Addition that is omitted from Lendee First Addition. Also, the record includes the legal descriptions that were used in the original deed and the corrective deed[2] used to transfer the property to appellant. Both of these descriptions state that the western boundary of the transferred property is the "West line of said

[1] Appellant attached to his affidavit a drawing that appellant describes as an amendment to the Lendee First Addition plat. When a filed plat contains an incorrect description of the platted land, the registered surveyor who prepared the plat may execute a certificate that states the error and supply the information needed to correct the error. Minn. Stat. § 505.174 (2012). When the certificate has been approved by the governing body of the area involved and signed by the clerk of that body, the county recorder shall accept the certificate for filing and recording. Minn. Stat. § 505.176 (2012). The record contains a document titled Land Surveyor's Certificate of Plat Correction, but the document is unsigned, and the record does not show that the certificate has been approved by the governing body of the area involved, signed by the clerk of that body, and accepted by the county recorder for filing and recording. Consequently, the record does not show that any correction has been made to the plat for Lendee First Addition.

[2] The correction made by the corrective deed affects the northeast corner of the property description; it does not change the description of the western boundary of the property.

Government Lot 1" and that the transferred property extends along this line "to the shoreline of Round Lake." This means that the shoreline of the property transferred by both deeds ends at the "West line of said Government Lot 1," which is where the shoreline in Kimball Addition begins. No shoreline between Lendee First Addition and Kimball Addition was omitted from the property described in the two deeds.

Appellant also argues that "[e]ven if respondents inadvertently retained the 40 feet of lakeshore and the strip of land on the western border, they breached the material terms of the contract and are liable for failure to deliver the amount of property as stated in the purchase agreement." Appellant cites nothing in the record to support this argument, and we have found nothing that supports the argument.

The purchase agreement states that the property described in the purchase agreement consists of approximately 4.40 acres. But the purchase agreement, which was prepared by appellant's real estate agent, does not include any property description and, instead, simply refers to the MLS listing number for the property. The property description in the MLS listing states only that the property is approximately 4.40 acres that are part of government lot 1. Appellant does not cite any evidence that shows the actual size of the property, but we note that the city staff report that accompanied appellant's preliminary plat application states that the sizes of the three lots in the plat are 1.71 acres, 1.83 acres, and 1.47 acres. This is a total of 5.01 acres, which is greater than the approximate 4.40 acres stated in the purchase agreement.

Finally, as the district court concluded, the purchase agreement required respondent ETOC to provide a certificate of the survey of the property "showing the 3

lots separated each with own PID and legal description." The district court noted that appellant "does not dispute that [respondents] obtained the services of a surveyor and paid for the survey." And the undisputed evidence in the record demonstrates that a final plat that divided the property into three buildable lots with driveway access was approved by the city and filed with the county recorder. The legal description in the corrective deed used to transfer the property to appellant exactly matches the filed final plat of Lendee First Addition. Viewed in the light most favorable to appellant, the evidence is insufficient to create a fact issue as to whether respondents breached the terms of the purchase agreement.[3] We therefore conclude that the district court properly granted respondents summary judgment on appellant's breach-of-contract claim.

Affirmed.

[3] Appellant's amended complaint alleges that respondents' surveyor "acknowledged that the existing plat of Lendee First Addition contains errors, omissions and defects, including incorrect bearings and distances along the west line of Lot 1, Block 1, Lendee First Addition." But the complaint does not allege that the errors, omissions, and defects prevented the property from being divided into three buildable lots with driveway access, which is what the purchase agreement required. Even if appellant can show that the plat of Lendee First Addition needs to be corrected, appellant's allegations do not lead to a conclusion that respondents breached a term of the purchase agreement.