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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1356

Jerald Alan Hammann,
Appellant,

vs.

Turnstone Calhoun L.L.C.,
a Delaware limited liability company, et al.,
Respondents,

Burnet Title, Inc., et al.,
Respondents.

Filed July 29, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-05-015511

Jerald A. Hammann, 17400 Evener Way, Eden Prairie, MN 55346 (pro se appellant)

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Timothy J. Grande, Frederick W. Vogt, Mackall, Crounse & Moore, PLC, 1400 AT&T Tower, 901 Marquette Avenue, Minneapolis, MN 55402 (for respondents Burnet Title, Inc., et al.)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

HUDSON, Judge

Appellant argues that the district court (1) erred in granting summary judgment on certain claims he brought; (2) erred in denying summary judgment to him on other claims; (3) erred in granting judgment as a matter of law to respondents during the jury trial because appellant failed to prove damages; (4) abused its discretion in denying his motions to amend the complaint; (5) abused its discretion in denying his motion to remove the district court judge; and (6) abused its discretion in denying his motion for a new trial. We affirm.

FACTS

On June 30, 2003, appellant purchased condominium unit 801 in the Calhoun Place building from respondent Turnstone Calhoun, LLC, pursuant to a purchase agreement.[1] Under paragraph 12 of the purchase agreement, Turnstone Calhoun was required, in relevant part, to provide appellant with a commitment for a title-insurance policy, deliver a warranty deed conveying a marketable title, and release any current mortgage as to the unit sold. Respondent Lawyers Title Insurance Company issued the title insurance and respondent Burnet Title was the closer for appellant's purchase. Turnstone Calhoun paid off the two pre-existing mortgages and paid fees to respondent Burnet Title to file the certificates of satisfaction. The certificates of satisfaction were not filed at that time.

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[1] Appellant also purchased unit 701 in the same building, but most of his claims relate to unit 801.

Around July 2004, appellant applied for a home-equity line-of-credit loan on unit 801 from BankOne, the proceeds of which he intended to use to purchase additional condominiums. He learned that the two liens remained on unit 801 because the certificates of satisfaction of mortgage had never been filed and asserted that because of these encumbrances, BankOne denied his application on July 29, 2004. Appellant then obtained a home-equity line-of-credit loan from another lender, GreenPoint, on September 22, 2004, which he asserted was at a higher interest rate and less favorable terms. The certificates of satisfaction were ultimately filed in November 2004.

Appellant then sued respondents, claiming, among other things, that they breached the purchase agreement and warranties based on their collective failure to file the certificates of satisfaction of mortgage (the "title-related" claims), the manner in which the parking stalls for the units were assigned, and the fact that the heat failed in unit 801 in the winter of 2004. During the course of litigation, appellant filed several motions to amend his complaint. The court allowed him to proceed only with his first amended complaint.

All of the parties moved for summary judgment, which the court granted in part and denied in part. The only claims that remained for jury trial were appellant's title-related claims. In addition, appellant was limited to seeking damages for direct economic losses and was not allowed to seek consequential damages.

The day before trial, appellant sought to remove, for prejudice, the district court judge assigned to the case. The district court judge denied his motion. The chief judge of the district court also heard and denied the motion.

On the first day of trial, appellant moved to amend his first amended complaint to add a new claim of negligence against each of the respondents. The district court denied the motion as untimely and unsupported by law.

The matter proceeded to trial by jury with appellant appearing pro se, and he testified as to his version of events. When he sought to introduce details as to the BankOne loan denial, the district court sustained objections based on foundation and hearsay. The district court allowed appellant until the next day to arrange for witnesses or evidence to show that, but for the liens on the property, he would have received the BankOne loan and to show the terms of the loan, but appellant was unable to do so. The district court granted respondents' motion for judgment as a matter of law under Minn. R. Civ. P. 50.01 and dismissed the complaint. Appellant obtained counsel who argued his motion for a new trial, but the district court denied the motion. This pro se appeal follows.

D E C I S I O N

I

We first address appellant's challenges to the district court's decision to grant summary judgment on certain claims.

A motion for summary judgment shall be granted if the submissions to the court "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. On appeal, this court will examine whether there are genuine issues of material fact and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

"[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

We first address appellant's challenges to the district court's decision to grant summary judgment as to Turnstone Group, LLC, and Charles R.E. Johnson, individually, who signed the purchase agreement in his capacity as president of Turnstone Calhoun. First, the district court granted summary judgment on appellant's contract claims against Turnstone Group because appellant made no showing that he had a contractual relationship with Turnstone Group. This was correct because to recover for a claimed breach of contract, there must first be a contract. *Royal Realty Co. v. Levin*, 244 Minn. 288, 292, 69 N.W.2d 667, 671 (1955). Turnstone Group is the chief operating manager of Turnstone Calhoun. Appellant purchased unit 801 from Turnstone Calhoun. As respondents correctly note, while Turnstone Group was designated to execute the purchase agreement on behalf of Turnstone Calhoun, under the terms of the purchase agreement, the only parties to the contract were appellant and Turnstone Calhoun.

The district court also granted summary judgment in favor of Johnson because Johnson signed the purchase agreement as president of Turnstone Calhoun, not in his individual capacity, and appellant has not made any showing to the contrary. This, too, was correct because absent evidence to the contrary, "an agent making a contract for a disclosed principal does not become a party to the contract." *Aberman v. Malden Mills Indus., Inc.*, 414 N.W.2d 769, 773 (Minn. App. 1987). Therefore, we affirm summary judgment in favor of Turnstone Group and Johnson individually.

Next, appellant raises several issues not contained in his first amended complaint or decided by the district court. These include alleged violations of the Minnesota Common Interest Ownership Act, Minn. Stat. §§ 515B.1-101 to .4-118 (2006), and Minn. Stat. § 507.45, subd. 4(a) (2006), as well as tort claims. Generally, issues not raised to, or decided by, the district court will not be decided for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We decline to consider these issues. To the extent that any of these claims are asserted elsewhere in other arguments made by appellant, we decline to consider them as well.

We also review several breach-of-contract claims on which the district court granted summary judgment to Turnstone Calhoun as a matter of law. First, appellant challenges summary judgment on his claim that Turnstone Calhoun breached its contract and implied warranty because the heat in unit 801 did not work in winter 2004, requiring replacement of a defective valve, which cost $787.50. In support of his argument, appellant cites a marketing brochure from the condominium association stating that heating is among the amenities included in Calhoun Place.

Paragraph 22 of the purchase agreement provides that the purchase agreement and disclosure statement constitute the entire agreement, so appellant cannot rely on any statements contained in the marketing brochure. Appellant also cites the disclosure statement, which provides in relevant part that heating "is common to the building but can be separately controlled for each Unit." Appellant has not shown that the facts he alleges regarding the repair of his heating system more than a year after he purchased the

unit support his claims. Appellant has not shown that the district court erred in ruling that he could not prevail on these claims as a matter of law.

Next, appellant argues that the district court erred in granting summary judgment on his claims that he was not assigned his two parking stalls[2] according to the priority procedure orally conveyed to him by Turnstone Calhoun's agent. Instead, he asserts that Turnstone Calhoun personnel and Johnson *attempted* to assign him inferior parking stalls for retaliatory reasons, and that the inferior parking stalls would have diminished the market value of his units. The district court ruled that there was no evidence that Turnstone Calhoun had a contractual obligation to provide any specified parking spots to appellant; instead, paragraph 1 of the purchase agreement states that the assignment of the parking stalls were "TBD," presumably indicating "to be determined." We agree. Further, paragraph 22 of the purchase agreement provides that only the terms in the purchase agreement or any subsequent written and executed amendments are binding, so that alleged oral warranties would not be enforceable. In any event, none of the other written provisions concerning parking stalls provide any particular method for assigning them. Finally, appellant does not assert that he in fact was assigned an inferior parking space. *Cf. Twin Cities Metro. Pub. Transit Area v. Holter*, 311 Minn. 423, 425, 249 N.W.2d 458, 460 (1977) (stating that "[a] party who is not aggrieved by a judgment may not appeal from it"); *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, a party must show both error and prejudice).

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[2] Appellant was entitled to two parking stalls, one for each unit that he purchased.

Appellant also challenges summary judgment on his claim that he was wrongfully required to pay rent after he terminated his lease on apartments at Turnstone RiverWest, which was being converted to condominiums. Briefly, appellant attempted to sublease his apartment, but the lease required the lessor's consent to a sublease, and Turnstone RiverWest refused consent. Thus, the district court properly ruled that appellant had no claim for lost rents on the sublease. Appellant also asserted that he lost rent because Turnstone RiverWest refused to permit him to maintain a key lockbox and advertise his units for rent. But it does not appear that appellant raised this claim below, and the district court did not address it. Generally, appellate courts will not address questions not previously presented to, and considered by, the district court. *Thiele*, 425 N.W.2d at 582.

Appellant next contends that the district court erred in granting summary judgment in favor of Turnstone Calhoun on a retaliation claim. Appellant asserted that Turnstone Group and Johnson retaliated against him for complaints he asserted against Turnstone Calhoun by refusing to allow him to list his sister's interest in a condominium at RiverWest on the multiple listing service. The district court granted summary judgment on this claim because (1) a free-standing retaliation claim is not recognized in Minnesota law; and (2) the unit listed for sale was not owned by appellant or his sister (who only had an option to purchase it), but instead was owned by Turnstone RiverWest, and neither appellant nor his sister may list for sale what neither owns. Further, RiverWest already had an exclusive listing agreement with Coldwell Banker/Burnet to list the units it owned. Appellant has not shown that the district court erred in granting summary judgment on this claim.

II

We next address the district court's denial of all of appellant's motions for summary judgment on his title-related claims, with the exception of appellant's claim for consequential damages, on which the court granted summary judgment for respondents. Appellant asserted that his application for a home-equity loan from BankOne for unit 801 was denied due to the delay in filing the certificates of satisfaction. Although he later obtained a loan from GreenPoint, he asserted that it was at higher interest rates and less favorable terms.

A. Appellant's challenge to the denial of his motion for summary judgment on liability.

First, the district court ruled that there were many material factual disputes surrounding the failure to file the certificates of satisfaction that precluded summary judgment on the title-related claims. As the district court correctly noted, Turnstone Calhoun was obligated to deliver a marketable title and ensure that its mortgages were released, and the issue of whether it reasonably relied upon Burnet Title to file the satisfaction of liens was a question for the fact-finder. In addition, Burnet Title's liability for failure to file the mortgage satisfaction liens was also at issue. Finally, the finder of fact would also have to determine whether appellant properly notified Lawyers Title of the title defect and whether Lawyers Title promptly cured the title defect. Here on appeal, appellant essentially reargues the facts in support of his argument that the district court should have granted summary judgment in his favor. But he has not shown that

there are no genuine issues of material fact. The district court did not err in denying summary judgment.

Appellant separately argues the merits of his title-related arguments. The resolution of these issues is not properly before this court because the district court did not reach them, having later granted judgment as a matter of law on other grounds. *See Thiele*, 425 N.W.2d at 582 (stating that reviewing court will not address issue raised but not decided by the district court).

B. Appellant's challenges to summary judgment rulings on direct damages.

Appellant also argues that the court should have granted summary judgment on his claim for direct damages because it found that the failure to file the certificates of satisfaction caused his increased costs and expenses for the GreenPoint loan. The district court, however, stated that he could "claim" these direct damages; it did not grant summary judgment on the direct-damages claim.

Next, appellant contends that the district court erred in ruling that his claim for direct damages ended on August 24, 2005, when appellant paid off the GreenPoint loan. Appellant has not shown that there are genuine issues of material fact as to this argument.

C. Appellant's challenge to the grant of summary judgment to respondents as to consequential damages.

Appellant next challenges the district court's ruling that he could not present claims for consequential damages. The "non-breaching parties should recover [consequential] damages sustained by reason of the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when

making the contract as the probable result of the breach." *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983).

Appellant argued that he should be able to recover consequential damages because when BankOne denied his application for a home-equity loan, he could not use that money for other potentially profitable real estate investments as he had planned. The district court ruled that these damage claims were remote, speculative, and not foreseeable. First, it stated that the claims were "based solely upon a series of rosy assumptions and, as such, speculative in the extreme." Further, the court ruled that consequential damages in a contract case are limited to those foreseeable to the parties at the time the contract was agreed to. Here, neither Turnstone Calhoun, Burnet, or Lawyers Title could have reasonably foreseen that appellant intended to borrow against his condominium to purchase even more expensive condominiums, because under paragraph 16 of the purchase agreement, appellant warranted that he was purchasing the unit as a residence "and not for investment." Appellant has not shown that summary judgment on this ground was error.

III

After the district court denied summary judgment on appellant's title-related claims, he was allowed to present these claims to the jury. The district court, however, granted judgment as a matter of law because appellant was unable to produce admissible evidence to prove that he suffered damages from the denial of the BankOne home-equity loan.

A district court may grant judgment as a matter of law during a trial by jury if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01(a); *see* Minn. R. Civ. P. 50 2006 advisory comm. cmt. (recognizing that change of terminology from judgment n.o.v. and directed verdict to judgment as a matter of law did not change substantive law relating to such proceedings). A district court should grant judgment as a matter of law when the court would be "obligated to set aside a contrary verdict by the jury as being manifestly against the entire evidence because reasonable persons could draw only one conclusion from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). In reviewing judgment as a matter of law, the appellate court "must independently determine whether an issue of fact exists when the evidence is viewed in a light most favorable to the nonmoving party." *Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995). Evidentiary rulings by the district court will not be reversed absent an abuse of discretion. *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994).

Appellant first argues that he did not realize that he had to offer evidence as to the BankOne loan because the district court denied respondents' motion for summary judgment as to damages. But the district court ruled not that the facts as to damages were undisputed, but that appellant "may clearly *claim* the direct increased costs and expenses related to his home equity loan caused by the failure to file the lien satisfaction." (Emphasis added.) "In the ordinary civil action, . . . the plaintiff has the burden of proving every essential element of his case, including damages, by a fair preponderance of the evidence." *Carpenter v. Nelson*, 257 Minn. 424, 427, 101 N.W.2d 918, 921

(1960). Appellant's belief that he did not have the burden of proving damages has no support.

Next, appellant challenges the district court's rulings excluding the evidence he sought to introduce. The district court is to determine the admissibility of evidence. Minn. R. Evid. 104(a), 1008. Authentication or identification of a document is "a condition precedent to admissibility," which "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). A witness may testify that a document is what it is claimed to be. *Id.*, 901(b)(1). But the witness may only testify as to matters of which "the witness has personal knowledge." Minn. R. Evid. 602.

First, appellant sought to testify as to what a BankOne official told him about the reason for the denial of the loan. The court ruled that this was hearsay. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. It is self-evident that the testimony in question is hearsay and appellant did not show that an exception applied; accordingly, appellant has not shown that the district court abused its discretion in ruling the hearsay inadmissible.

Appellant also sought to introduce BankOne records originally obtained by respondent Lawyers Title in discovery. Appellant was unable to authenticate these records. While appellant asserts that the one-page certification of an alleged BankOne employee provides the necessary foundation under Minn. R. Civ. P. 32.01(c)(2), that rule

addresses the admissibility of the deposition of an out-of-state witness, not authentication of records.

Next, appellant asserts that his offer for a "telephone deposition" of a BankOne employee—previously undisclosed—at the trial would have rendered BankOne's business records admissible. Appellant cites provisions for telephonic depositions under Minn. R. Civ. P. 30.02(g) and the use of depositions for out-of-state witnesses, Minn. R. Civ. P. 32.01(c)(2), but at trial, appellant was seeking to use the live telephonic testimony of a witness. Under Minn. R. Civ. P. 43.01, "[i]n all trials the testimony of witnesses shall be taken orally in open court" unless otherwise provided. Appellant did not demonstrate to the district court that an exception to this rule was applicable; accordingly, he has not shown that the district court's decision not to allow such testimony was an abuse of its discretion.

Appellant contends that various other facts showed that he would have been able to obtain a loan from BankOne on unit 801 but for respondents' collective failure to file the certificates of satisfaction. But without the evidence regarding the BankOne loan, there would be no legally sufficient basis for the jury to find in favor of appellant.

In addition, appellant argues that respondents never asserted that appellant was not damaged as a result of the failure to properly file the certificates of satisfaction. He asserts that the district court provided these new arguments on behalf of respondents at trial and unfairly took him by surprise. But counsel for respondent Burnet, in his opening statement, clearly challenged the damages asserted and appellant's argument has no merit.

IV

The district court granted appellant's motion to amend his complaint, and he filed his first amended complaint. But appellant contends that the district court erred in denying his later motions to amend.

After a responsive pleading has been served, a party may amend a pleading only by leave of the court or by written consent of the adverse party. Minn. R. Civ. P. 15.01. Here, respondents did not consent to appellant's proposed amendment of his complaint. The district court has broad discretion in deciding whether to grant or deny a motion to amend a complaint, and an appellate court will not reverse the decision unless there is a clear abuse of discretion. *Fabio*, 504 N.W.2d at 761.

Appellant has not demonstrated that the district court abused its discretion when it denied additional motions to amend, which included a request to add a negligence count the day before trial. In addition, appellant may not raise the issue of negligence for the first time on appeal. *Thiele*, 425 N.W.2d at 582.

V

Next, appellant challenges the district court's decision to deny his request to remove the district court judge. The day before trial, appellant moved to remove the district court judge and the judge denied the motion. The chief judge of the district court then considered and denied his motion, ruling that he failed to make an affirmative showing of cause and there was no evidence of bias.

A party may make a motion to remove a judge for cause under Minn. R. Civ. P. 63.02. The motion must first be brought against the judge who is the subject of the

motion and then, if the motion is denied, may be reconsidered by the chief judge. Minn. R. Gen. Pract. 106. The decision to deny a request for removal based on bias will be reviewed under an abuse-of-discretion standard. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002). Where there is no evidence to support a claim of prejudice or bias, the appellate court will not find an abuse of discretion in denying a motion to remove. *Id.*

Appellant's assertions appear to express dissatisfaction with the district court's rulings. He has not shown an abuse of discretion in denying the motion to remove.

VI

Finally, appellant challenges the district court's decision to deny his motion for a new trial. A party may move for a new trial under Minn. R. Civ. P. 59.01. The district court's decision on a motion for a new trial will be reviewed under an abuse-of-discretion standard. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). "The primary consideration in determining whether to grant a new trial is prejudice." *Wild v. Rarig*, 302 Minn. 419, 433, 234 N.W.2d 775, 786 (1975).

When appellant moved the district court for a new trial, the district court judge who had presided was retiring from the bench. Appellant's motion was assigned to a successor district court judge, who heard and denied the motion for a new trial.

Appellant first argues that the predecessor judge improperly refused to schedule appellant's motion, even though he retired more than 60 days after the hearing and therefore had ample time to rule on his motion. *See* Minn. R. Civ. P. 63.01. Appellant, who makes this argument despite the fact that he also argued that the predecessor district

court judge should have been removed for cause and failed to object to the reassignment, has not shown an abuse of discretion.

If a successor judge believes the duties related to a motion for a new trial cannot be performed because the successor judge did not preside at trial, or for some other reason, that judge may exercise discretion to grant a new trial. Minn. R. Civ. P. 63.01; *see Kornberg v. Kornberg*, 542 N.W.2d 379, 385 (Minn. 1996) (holding that rule 63.02 applies to predecessor judges who retire). A successor judge need not grant a new trial if the record is sufficient to "pass fairly and intelligently" on the motion. *Thayer v. Duffy*, 240 Minn. 234, 251, 63 N.W.2d 28, 38 (1953). It is the duty of the successor judge to exercise the same discretion in deciding whether the motion should be granted as if the matter had been tried before the successor judge based on the record. *Id.*

Appellant contends that the motion for a new trial should have been granted "automatically" because the successor judge did not have the official trial exhibits or the trial transcript. Consequently, appellant contends that he was unable to "pass fairly and intelligently" on the motion.

Under Minn. R. Civ. P. 59.02, a new-trial motion is to be made and heard "on the files, exhibits, and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit. A full or partial transcript of the court reporter's notes may be used on the hearing of the motion." Appellant obtained counsel to represent him at the new-trial motion hearing. Appellant's counsel noted that no transcript was submitted because, as indicated in the advisory committee notes to Minn. R. Civ. P. 59.01, it is no longer a requirement to do so and that it is required for appellate

review only. *Id.*, 1968 advisory comm. note. The district court noted that the lack of a transcript severely limited the court's capacity to address the motion. Appellant nonetheless chose to proceed without a transcript and he cannot argue for the first time on appeal that one is required. *Thiele*, 425 N.W.2d at 582.

Next, appellant's argument that the district court also did not have the trial exhibits is based on mere assertion unsupported by the record. Nor does the transcript reveal that the exhibits were missing.

Finally, appellant cites new evidence, which was not created until after appellant's motion for new trial had been fully briefed and argued. In any event, the affidavit has no foundation, is hearsay, and essentially restates the inadmissible BankOne records and thus cannot be deemed "newly discovered evidence." *See Le Neau v. Nessett*, 292 Minn. 242, 247, 194 N.W.2d 580, 584 (1972) (providing that affidavit by a defendant in support of motion for new trial containing hearsay in part cannot support new trial motion).

Appellant had a full and fair opportunity to prove his case but was unable to do so. The decision of the district court is affirmed.

Affirmed.