STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2088

Gene Allen,
Appellant,

vs.

N. Bruce Thom,
Respondent,

Varistar Corporation, et al.,
Respondents,

Thomas Mikal Snortland,
Respondent.

Filed July 15, 2008
Affirmed
Ross, Judge

Otter Tail County District Court
File No. 56-C1-07-000485

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Collins, Judge.*

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

ROSS, Judge

This appeal arises from a dispute over ownership interests in the Fargo-Moorhead RedHawks baseball team. Gene Allen appeals from the district court's dismissal of his claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Allen's claims arise from a settlement agreement between Allen and Varistar Corporation, which resolved a prior dispute over the value of two Limited Liability Companies (together "the RedHawks") in which Allen owned a minority interest. Under the terms of the settlement agreement, Varistar paid Allen for his ownership interest and gave Allen the right to a portion of the sale price of the RedHawks if Varistar sold them for more than $2.5 million. Allen's complaint asserts that Varistar sold the RedHawks to N. Bruce Thom, Varistar's departing chief executive officer, for $1.7 million, which is an amount that Allen claims was significantly less than the fair market value of the team. The complaint asserts that Varistar's alleged bargain-price sale to a corporate insider breached the settlement agreement and the implied covenant of good faith and fair dealing. The district court dismissed Allen's claims because it concluded that the plain terms of the settlement agreement imposed no duty on Varistar to sell the team for more than $2.5 million. We have weighed the very well-presented arguments of all parties, and we affirm.

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

FACTS

The parties refer to Fargo Baseball LLC and Fargo Sports Concessions LLC as the Fargo-Moorhead RedHawks, a minor-league baseball team. Allen owned 15 percent of the RedHawks and had an option to purchase an additional 10 percent, while Varistar owned the remaining 85 percent.

The parties entered into a settlement agreement to resolve a valuation dispute, and that prior dispute and settlement underlie the current dispute. Allen had asserted that the team was worth $4.3 million, and Varistar asserted that it was worth between $2 million and $2.3 million. In April 2000, Allen settled with Varistar; with N. Bruce Thom, who is Varistar's chief executive officer; and with Lauris Molbert, the chief operating officer of Varistar's parent company. Under the settlement agreement, Allen sold his ownership interest and his purchase option to Varistar for $600,000 and for the right to 25 percent of any portion of the RedHawks' eventual sale price exceeding $2.5 million. The settlement agreement imposed no duty on Varistar to sell the team at all, and it specified no method for it to establish a sale price in the event of a sale. Four years later, Varistar sold the RedHawks to Thom for significantly less than $2.5 million, triggering this dispute.

The 2004 sale coincided with Thom's retirement from Varistar. Varistar sold the RedHawks to Thom and co-investors, including respondent Thomas Mikal Snortland, for $1.7 million and a debt assumption of $50,000. Allen's complaint alleges that by 2004 the team had a fair market value of $4.5 million, and it notes that the $1.7 million sale price is lower than the team value that Varistar had asserted during the 1999-2000 valuation dispute.

Allen claims that investors would have paid more than $1.7 million, but he does not allege that any investor known to Varistar would have paid $4.5 million, or even $2.5 million.

Allen sued Varistar, Thom, Molbert, and Thomas Snortland, claiming breach of the settlement agreement, breach of the implied covenant of good faith and fair dealing, conversion, and intentional interference with economic relations. The district court dismissed all of his claims for failing to state a claim on which relief could be granted.

In dismissing Allen's breach-of-contract claim, the district court noted that the settlement agreement required additional payment to Allen only if Varistar sold the RedHawks for more than $2.5 million. Because Allen's complaint stated that the team sold for $1.7 million, the court held that there was no duty to pay, and therefore no breach. In dismissing Allen's claim of breach of implied covenant of good faith and fair dealing, the district court reasoned that the implied covenant of good faith does not extend to actions beyond the scope of the contract. *See In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 503 (Minn. 1995) (noting that the scope of an underlying contract limits the implied covenant of good faith and fair dealing). Because the settlement agreement contained no provision requiring a fair-market appraisal or open-market sale of the team, the district court concluded that Allen's claim for breach of the implied covenant of good faith and fair dealing was beyond the scope of the contract's terms and should be dismissed.

Allen appeals the dismissal of his claims for breach of contract and breach of the implied covenant of good faith and fair dealing, but he does not challenge the district court's dismissal of his other claims.

D E C I S I O N

We review de novo a dismissal on the pleadings. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). And we treat the facts in the complaint as true. *Loftus v. Hennepin County*, 591 N.W.2d 514, 516 (Minn. App. 1999), *review denied* (Minn. June 29, 1999). A district court must dismiss a claim under rule 12.02(e) of the Minnesota Rules of Civil Procedure if the complaint fails to state a claim upon which relief may be granted. The rule does not authorize dismissal "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Doyle v. Kuch*, 611 N.W.2d 28, 31 (Minn. App. 2000); *see also Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980) ("[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.").

Allen's two arguments in the district court and on appeal both regard breach of contract, although they are presented in separate terms as breach of contract and breach of the implied covenant of good faith and fair dealing. A breach of the implied covenant is itself a breach of the contract. A breach of contract occurs when contract performance is hindered or rendered impossible by a party. *Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 303 (Minn. App. 2004). "Stated differently, every contract contains an implied condition that each party will not unjustifiably hinder the other from performing." *Zobel & Dahl Const. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984). It is partly for this reason that "every contract includes an implied covenant of good faith and fair dealing." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d at 502. We will address Allen's arguments for breach first considering the allegedly violated express terms of the contract, and then the implied terms.

I

Allen argues that the district court erred by dismissing his claim of breach of contract on the theory that the $1.7 million sale price does not accurately reflect Thom's actual purchase price. Allen essentially contends that Varistar breached an express term of the contract by failing to pay him after selling the RedHawks to Thom for more than the $1.7 million face value of the sale agreement. This argument develops in stages. In his opening brief, Allen pointed out that "[t]here is no reference whatsoever to the insider nature of the deal in the [district court's] Memorandum" dismissing the complaint. And he added that "[o]ne can read the Memorandum without ever getting the sense that the sale . . . was by a boss to his subordinate executive *as part of the retirement of that executive* from a parent company." (Emphasis added). In his reply brief, Allen made the argument more expressly: "Varistar received *not only* $1.7 million, but also the departure by retirement of Thom from the company—something of value which it will not share with Allen. *Varistar really received, therefore, two items of consideration*." (Emphasis added).

The problem with Allen's extra-consideration argument is factual rather than conceptual. Varistar's counsel acknowledged at oral argument on appeal that if the sale ostensibly for $1.7 million additionally discharged some obligation that Varistar owed to Thom or his co-investors, Allen might have a viable claim. For example, if Varistar sold the RedHawks to Thom for his agreement to discharge $1 million owed to him by Varistar or as a substitute for a $1 million severance package that Varistar otherwise would have provided to him directly, then the sale price would actually have been $2.7 million ($1.7 million cash plus $1 million as a discharge of an obligation). Varistar's counsel acknowledged that a cash-plus-debt-forgiveness purchase such as this could support the claim that Varistar had breached the express terms of the settlement agreement. But despite Varistar's concession, Allen's argument lacks a basis in the complaint.

Allen included no allegation of a cash-and-noncash purchase in his complaint. Equally fatal to recovery on this theory are Allen's failure to allege that this sort of noncash consideration occurred in the sale and his very specific complaint allegation to the contrary: "In or about February 2004, . . . Varistar sold the RedHawks to Thom . . . at the unreasonably low price of $1.7 million. . . . The buyers also assumed the obligation to pay a $50,000 note receivable." We therefore need not address the possibility that Allen might be able to produce evidence that the sale of the RedHawks to Thom involved an exchange of value beyond the $1.7 million and the $50,000 debt assumption. *See Bodah*, 663 N.W.2d at 553 ("The reviewing court must consider only the facts alleged in the complaint."); *see also Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) (requiring that a complaint "allege sufficient facts to state a claim"); *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d at 497 ("[T]he court may not consider extrinsic evidence on a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e)."). Having failed to allege that any noncash consideration added to the actual sale price of the team, Allen's argument that the district court erred by overlooking that theory fails to persuade us that the district court erred by dismissing the complaint.

II

Allen next argues that the district court dismissed his complaint erroneously because the court failed to consider the related concepts of frustration of a condition precedent and the implied covenant of good faith and fair dealing. The argument has general appeal, but it ultimately fails to persuade us. Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d at 502. This covenant forbids a party to unjustifiably prevent its performance of the contract. *Id.* "[C]ourts employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 371 (1980). The implied covenant of good faith and fair dealing applies when one party exercises discretion, thereby controlling the other party's benefit. *Id.* at 369. Similarly, a party who caused nonperformance of a condition precedent may not raise nonperformance of the condition as a defense to a claim of breach of contract. *Olson v. Penkert*, 252 Minn. 334, 343, 90 N.W.2d 193, 200 (1958).

Allen contends that Varistar engaged in presumptively fraudulent self-dealing and breached the implied covenant of good faith because it allegedly frustrated a sale of the RedHawks at a price above $2.5 million. *See Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 449 (Minn. 1980) ("[A] party to a contract cannot avoid its duties under the contract by preventing the performance of the other party or by disabling itself from performance."). Allen supports his argument that dismissal was error by noting that the sale was to a corporate insider and therefore ought to be viewed with suspicion; that the RedHawks were sold for a significantly lower price than Varistar's previous valuation of the team; and that the limited record at this early stage of the litigation might be bolstered later by discovery to develop facts favorable to Allen's contract claim.

Allen is correct that courts view insider transactions with suspicion. *See Snyder Elec. Co. v. Fleming*, 305 N.W.2d 863, 867 (Minn. 1981) ("Transactions involving corporations and their executives or corporations under the common control of the same officers and directors are to be regarded with skepticism by the courts and closely scrutinized."). This offers theoretical support to Allen's implied-covenant theory, as does the more direct concept that, "in all cases of claimed self-dealing or conflict of interest against corporate officers and directors, such transactions are presumptively fraudulent." *Id.* Although the record does not indicate that Allen is a shareholder in Varistar, the presumptive suspicion that accompanies corporate-insider transactions is a yellow flag hanging over the sale between Varistar and its outgoing chief executive officer.

Allen highlights the suspicion further with his allegation that the 2004 sale price was lower than Varistar's 2000 estimated value of the team. According to the complaint, Varistar valued the RedHawks at between \$2 million and \$2.3 million before settling with Allen. The RedHawks were successful in the 2000-2003 seasons and won the Northern League championship in 2003. Allen asks us to infer that because the team performed well after the settlement agreement, its value increased. Allen offers this as additional evidence that the sale was not in good faith.

But Allen directs us to no caselaw holding that the presumption of fraud that occurs in shareholder suits to shift the burden to the director or officer to show impartiality and fairness between a corporation and its agents should apply in collateral contract cases such as this. And Varistar argues persuasively that we should not apply the covenant of good faith and fair dealing so as to impose a substantive term in the settlement agreement requiring Varistar either to appraise the team or to sell it on the open market or at any specific price. We agree that the implied covenant of good faith and fair dealing does not require such a term here. Cases that have analyzed the implied covenant have applied it only to enforce existing contractual duties, and not to create new ones. *See In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d at 503 (holding that implied covenant prevents party from escaping express contractual duty to pay early-redemption bond premium); *Space Ctr., Inc.*, 298 N.W.2d at 449 (holding that implied covenant prevents party from escaping express contractual duty to convey good title); *see also Minnwest Bank Cent.*, 689 N.W.2d at 303 (holding that because there was no contractual duty to provide long-term financing, there was no breach of implied covenant). We are therefore ultimately unconvinced by Allen's allegation and arguments that Varistar breached the settlement agreement by failing to sell the team at fair market value.

This marks the critical flaw in Allen's position. The settlement agreement imposes no duty to assign a fair-market-value price tag to the team. And while Allen's complaint alleges a fair market value of $4.5 million at the time of the sale, it does not allege that Varistar was aware of any buyer who would pay more than the eventual sale price. We believe that Allen is correct that even without contract language that established a specific sale price or that required a sale at maximum value, Varistar was prohibited from setting a price in bad faith to frustrate the working of the condition. But we must affirm the district court's dismissal on the facts alleged. The complaint asserts that there were actual suitors who would have paid in excess of $1.7 million. But it does not allege that any buyer would have paid in excess of $2.5 million, satisfying the condition and triggering Varistar's duty to pay Allen a portion of the sale proceeds. Nor does it assert even that Varistar was aware of any alleged potential buyer who might have paid any amount more than Thom.

The settlement agreement establishes that the parties intended any sale of the team to resolve their dispute over the value of Allen's ownership interest, based entirely on the team's actual sale price. But although Varistar was not free to intentionally undercut that interest in a bad-faith insider transaction designed to restrict the sale price, Allen has failed to allege circumstances that would support the broad proposition that Varistar acted in bad faith by selling the team to Thom for $1.7 million. Perhaps shopping the team openly would have resulted in a sale at a price above $2.5 million; but the contracting parties chose not to include any method by which Varistar must solicit a buyer or set a sale price, and Allen agreed that the express settlement agreement represented "the entire agreement between the parties."

The individual respondents raise other bases to affirm the district court's dismissal of the claims against them. Because we affirm on the grounds stated, we do not reach these arguments.

Affirmed.