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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-334**

John Mesenbrink, et al.,  
Respondents,

vs.

Riverwood ENT, LLC, et al.,  
Appellants,  
Riverwood ENT, LLC, third party plaintiff,  
Appellant,

vs.

Cheryl M. Wachal Trnka, third party defendant,  
Respondent,  
and  
Premier Development, Inc., et al.,  
Appellants,

vs.

JEM Mortgage Holdings, LLC,  
Respondent.

**Filed November 17, 2009  
Affirmed  
Stoneburner, Judge**

Blue Earth County District Court  
File Nos. 07CV07413, 07CV07551

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Mesenbrink Construction and Engineering, Inc., Orion Development, LLC, Cheryl M.  
Wachal Trnka, and J&M Mortgage Holdings, LLC)

Robert M. Gardner, Gardner Law Office, P.O. Box 22071, St. Paul, MN 55122-0071 (for appellants Riverwood ENT, LLC, and Premier Development, Inc.)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

## **UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellants challenge summary judgment dismissing counterclaims against respondents for breach of contract, breach of fiduciary duties, and conversion, arguing that the district court erred in concluding that although appellants produced sufficient evidence of breach of fiduciary duty to withstand summary judgment, they failed to produce sufficient evidence to withstand summary judgment that the alleged breach of fiduciary duty caused the damages. Because appellants failed to produce any evidence that their claimed damages were caused by the alleged breach of fiduciary duty, we affirm.

## **FACTS**

Appellants Premier Development, Inc. (Premier) and respondents John Mesenbrink (Mesenbrink) and Orion Development, LLC (Orion) entered into an agreement to develop property known as the Fritz Property. About six weeks later, Mesenbrink Construction & Engineering, Inc. (Mesenbrink Construction), Orion, and Premier entered into a similar agreement to develop property known as the Domas Property.

Both agreements provided that each party to the agreement would have an equal vote regarding development and sale of the subject properties and that net profit from sale of the property would be divided equally. Mesenbrink Construction and Premier were the record owners of both properties but, by separate agreements, gave Orion an option to purchase each property.

Orion took the lead in obtaining the appropriate permits and developing the properties and incurred debt through Prior Lake State Bank to finance construction and development. Loans to Orion were secured by the personal guarantee of Orion's principal, Cheryl M. Wachal Trnka, and by mortgages on the properties granted by Mesenbrink Construction and Premier.

Approximately one year after Premier entered into the agreements, it assigned its interest in the properties, interest in the agreements, and obligations under the mortgages to appellant Riverwood ENT, LLC (Riverwood) for \$200,000.

Shortly after this assignment, Mesenbrink, Mesenbrink Construction, and Orion sued Premier and Riverwood, asserting that Premier and Riverwood (as Premier's assignee) refused to acknowledge Orion's interests under the agreements and refused to market the developments in accord with the agreement.<sup>1</sup> The action was for a declaratory judgment that the development agreements remained in full force and effect and sought damages for breach of contract and tortious interference with prospective business

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<sup>1</sup> The action arose because Premier and Riverwood took the position that Orion's option contract to purchase the properties extinguished the development agreements such that Orion was not entitled to an equal vote or equal share of profits in the development projects.

relations, or alternatively, for violation of duties owed to a partnership under Minn. Stat. § 323A.0405 (2006).

Riverwood and Premier separately answered and counterclaimed for breach of contract, breach of fiduciary duty and conversion. Riverwood counterclaimed against Mesenbrink and brought a third-party claim against Trnka for tortious interference with contract. Riverwood's counterclaims were based on allegations that Mesenbrink, Mesenbrink Construction, and Orion engaged in various relationships with Premier and Riverwood that gave rise to duties and obligations that Mesenbrink, Mesenbrink Construction, and Orion violated, in part by using information obtained from the relationships to their benefit and the detriment of Premier and Riverwood.

Mesenbrink then formed JEM Mortgage Holdings, LLC (JEM). JEM purchased the loan documents related to the Fritz and Domas properties—including the mortgages against the properties—from Prior Lake State Bank. When Orion defaulted on the loans, JEM began foreclosure proceedings. JEM purchased the Fritz and Domas Properties at the foreclosure sale and, because no one redeemed the properties, is now sole owner of both properties.<sup>2</sup>

After discovery was complete, Mesenbrink, Mesenbrink Construction, Orion, Trnka, and JEM moved for summary judgment on Riverwood's and Premier's counterclaims and third-party action on the ground that Premier and Riverwood had failed to present sufficient evidence of breach of contract or damages to withstand

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<sup>2</sup> Premier and Riverwood sued JEM to challenge foreclosure and that action was consolidated with the existing action. But that action is not relevant to this appeal.

summary judgment. In response to the motion for summary judgment, Riverwood and Premier asserted that Riverwood's loss of its \$200,000 investment in the development project was sufficient proof of damages to withstand summary judgment.<sup>3</sup>

The district court concluded that Riverwood's and Premier's claim that the formation of JEM constituted a breach of contract and fiduciary duties was sufficiently supported by evidence to withstand summary judgment but nonetheless dismissed all of Riverwood's and Premier's claims because neither Riverwood nor Premier had produced evidence that the alleged damages were caused by the formation of JEM or any other dealings of the parties. This appeal followed.

## D E C I S I O N

On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the 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).

[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of

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<sup>3</sup> Prior to assertion of \$200,000 as damages, Riverwood and Premier had not articulated any measure of damages. Riverwood's co-owner stated at his deposition that he “[didn't] have a dollar amount” for damages and asserted that damages consisted of attorney fees, interest accrued on the loans, time and effort, and lost opportunity/lost profits. Riverwood's other co-owner stated that other than the \$200,000 investment, Riverwood has lost “[z]ero dollars” and agreed that, other than “time and efforts” there was nothing else to which Riverwood would look to calculate damages at that time.

the nonmoving party's case to permit reasonable persons to draw different conclusions.

*DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

“When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest on 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. To defeat a motion for summary judgment, a plaintiff must produce sufficient evidence to show a genuine issue of material fact as to each element of the claim. *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410–11 (Minn. 1994). Affidavits based on information and belief and containing only unverified opinions and allegations are insufficient as a matter of law under rule 56.05. *See Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286, 287 (Minn. 1983) (stating that an affidavit opposing summary judgment is not adequate if it only recites argumentative and conclusory allegations).

A cause of action for breach of fiduciary duty requires a showing of damages. *See Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989) (noting that a negligence count (duty, breach, causation, damages) alleges the same elements required for a claim of breach of fiduciary duty), *review denied* (Minn. Nov. 15, 1989). Similarly, without damages, a breach-of-contract action fails as a matter of law. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. App. 2004). “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).

Riverwood argues that because JEM foreclosed on the properties before Riverwood had an opportunity to profit from the development, they lost their \$200,000 investment; therefore its damages related to the breach are \$200,000 for “lost opportunity.” But Riverwood has not produced any evidence beyond its investment to prove the value of that opportunity. And, as the district court pointed out in the memorandum attached to the order granting summary judgment, “this was a losing venture for each party as each party incurred significant losses.” The development agreements provided for sharing profits, but did not provide for sharing losses. Because Riverwood has failed to prove damages caused by its alleged breach of contract and fiduciary duties, the district court did not err in dismissing Riverwood’s and Premier’s claims by summary judgment.

**Affirmed.**