STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2291

David L. Brierton, et al.,
Respondents,

vs.

Brown Deer Apartments Housing Associates, LLC, et al.,
Appellants.

Filed December 14, 2010
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-08-23605

Thomas H. Boyd, Matthew R. McBride, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for respondents)

Kenneth Hertz, Hertz Law Offices, P.A., Columbia Heights, Minnesota (for appellants)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

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

BJORKMAN, Judge

In this contract dispute, appellants challenge the partial summary judgment declaring appellants to be in breach of certain contractual obligations, the summary

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

dismissal of their counterclaims, and the district court's denial of appellants' motion to amend their pleadings and the scheduling order. Because the district court did not err in granting partial summary judgment or abuse its discretion in denying appellants' motions, we affirm.

FACTS

Respondents David L. Brierton, Jack W. Safar, Armand E. Brachman, Paul R. Sween, and Jeffry R. Huggett are real estate developers. In 1998, they created Brown Deer Leased Housing Associates, LLC (the Company), to be the managing general partner of Brown Deer Leased Housing Associates, Limited Partnership (the Partnership). Respondents were the sole owners and members of the Company.

The Partnership purchased Brook Lane Apartments (the Property), a low-income housing development located in Brown Deer, Wisconsin. The Partnership acquired the Property with a loan from Midland Mortgage Investment Corporation. In connection with the loan, the Company (as the managing general partner of the Partnership) undertook certain obligations outlined in the loan documents, including a mortgage and a Replacement Reserve and Security Agreement (Reserve Agreement). The mortgage required the Company to keep the property in good repair and the Reserve Agreement required the Company to fund and maintain an account to cover estimated repair and replacement costs as required by the lender. Through their operation of the Company, respondents also were responsible for paying the Partnership asset-management fees to limited partner American Tax Credit Corporate Fund VII, L.P. (ATCCF).

Appellants Asgher Jaweed and Hyder Jaweed own and manage residential apartment developments. On January 30, 2006, Hyder Jaweed formed appellant Brown Deer Apartments Housing Associates, LLC (Brown Deer) to own and manage an interest in the Company. On October 18, 2006, respondents sold a 49% interest in the Company to Brown Deer.

The transaction involved 13 interlocking contracts. The contracts at issue here include the Purchase Agreement, the Reserve Agreement, the Assignment and Assumption Agreement, the Member Control Agreement, and the Limited Partnership Agreement. The Purchase Agreement and the Assignment and Assumption Agreement sell and transfer the 49% ownership interest in the Company to Brown Deer. The Member Control Agreement provides that respondents will vote their membership interests in the Company to elect Brown Deer as the sole member of the Company's board of governors. The Assignment and Assumption Agreement requires Brown Deer to assume all of respondents' duties and obligations "existing, contingent, or otherwise, relating to the Partnership Agreement and any other agreement of the Company." This includes assuming the Company's obligations under the mortgage and Reserve Agreement and the responsibility for paying the Partnership's asset-management fees. The Jaweeds guaranteed Brown Deer's payment and performance obligations.

The Assignment and Assumption Agreement outlines eight separate events that constitute a default, including a bank-loan-documents monetary default, a partnership-agreement monetary default, and failure to cure any other deficiency under the bank-loan documents upon notice from the lender. In the event of a default, respondents are entitled

to elect their remedy, including a reversion of the 49% interest in the Company back to respondents. If respondents elect the reversion remedy, all amounts Brown Deer paid to respondents or invested in the Property are forfeited. And upon an incident of default, the Member Control Agreement provides for Brown Deer's removal as sole governor of the Company.

Brown Deer managed the Property for two years, during which time Brown Deer made improvements to what was then a 45-year-old development. In 2008, Brown Deer faced several allegations of default. On May 1, appellants received a letter from The Wentwood Companies, on behalf of ATCCF, indicating that Brown Deer had failed to pay certain asset-management fees and penalties. Later that summer, the loan servicer, MMA Financial, Inc. (MMA) advised Brown Deer of deficiencies in the condition of the Property. After a third party conducted a physical-needs inspection, MMA sent appellants letters on September 23 and October 6 demanding payment of $538,205 into an account to cover necessary repairs outlined in the inspection report. Appellants disputed MMA's demands, and MMA sent a final default letter on October 16.

On September 15, respondents notified Brown Deer that it was in default under the Assignment and Assumption Agreement for failing to pay amounts due under the mortgage, failing to pay asset-management fees, and failing to keep the property in good repair. Respondents advised appellants that they elected the reversion remedy pursuant to the Assignment and Assumption Agreement and that they had exercised their right under the Member Control Agreement to remove Brown Deer as governor of the Company and had elected themselves as governors. Because appellants did not

acknowledge these actions, respondents commenced this lawsuit seeking, among other things, declaratory relief establishing that respondents are entitled to the remedies as exercised. Before appellants answered the complaint, respondents interposed a motion for summary judgment.

In their answer and counterclaims, appellants sought declaratory and injunctive relief, and asserted a claim of unjust enrichment. Appellants argued that summary judgment would be premature because additional discovery was necessary. The district court heard respondents' summary-judgment motion on November 13. On January 12, 2009, the district court issued a scheduling order setting April 3 as the deadline for joining additional parties and May 15 for hearing nondispositive motions.

On March 13, the district court granted partial summary judgment in favor of respondents, declaring that appellants had defaulted under the agreements and that Brown Deer's 49% ownership interest had reverted to respondents. Respondents subsequently moved for summary dismissal of appellants' counterclaims on the grounds that they are moot or otherwise barred as a matter of law based on the March 13 order. Appellants retained new counsel who moved to amend their pleadings and the scheduling order to permit joinder of a new party and claim and to extend discovery. The district court heard all of the motions on June 19.

On September 16, the district court granted respondents' motion for summary judgment dismissing appellants' counterclaims. The next day, the district court denied appellants' motion to amend their pleadings and the scheduling order. Respondents

dismissed their remaining claims without prejudice, and final judgment was entered. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review de novo whether the district court erred in its application of the law and whether there were any genuine issues of material fact when the evidence is viewed in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). Where a contract is at issue, summary judgment is appropriate if the contract is unambiguous and the material facts are not in dispute. *See Estate of Riedel by Mirick v. Life Care Ret. Cmtys., Inc.*, 505 N.W.2d 78, 81 (Minn. App. 1993).

I. Respondents are entitled to a declaratory judgment as a matter of law.

In granting summary judgment on respondents' claim for declaratory relief, the district court found three independent events of default under the Assignment and Assumption Agreement. Appellants argue that the district court erred in determining, as a matter of law, that appellants defaulted under the terms of the parties' agreements and assert that there are genuine fact issues as to whether appellants: (1) defaulted under the bank-loan documents, (2) failed to pay asset-management fees pursuant to the Partnership Agreement, and (3) committed waste or failed to maintain the property in good repair under the mortgage. Appellants also challenge the district court's denial of their request

to delay consideration of the summary-judgment motion to permit additional discovery. We address each argument in turn.

A. Bank-loan-documents monetary default

With respect to the claimed bank-loan-documents monetary default, appellants assert that three material facts are in dispute: (1) whether there was a request for the shortage of the replacement reserve account, (2) whether the direction to place funds into a separate escrow account was a proper demand under the Reserve Agreement, and (3) whether the amount requested was a reasonable current estimate of the money needed for repairs. Appellants also assert that there is a dispute as to the intent of the Reserve Agreement.

1. Request for shortage

Section 10 of the Reserve Agreement states that "[i]n the event that the balance of the Replacement Reserve is less than the current estimated cost to make the Replacements required by the Lender, Borrower shall deposit the shortage within 10 days of request by Lender." MMA sent letters on September 23, October 6, and October 16 demanding that appellants deposit $538,205 into an escrow account related to several conditions on the Property that needed repair. Appellants do not dispute that they received these letters or their contents, but argue that there are fact issues as to whether the letters constitute a request and whether the amount requested is actually the "shortage" contemplated by the Reserve Agreement. We disagree.

MMA's three letters all direct appellants to deposit funds to cover the cost of necessary repairs. The October 6 and October 16 letters specifically state that the request

for the deposit is made pursuant to section 10 of the Reserve Agreement. We discern no disputed facts as to whether MMA's letters constitute requests under section 10.

Appellants' argument that, because $161,646 was already in the reserve account, any "shortgage" was the $376,559 difference between the amount in the account and the amount MMA requested is also unavailing. Whether the "shortage" was $538,205 or the lesser amount appellants suggest is immaterial because it is undisputed that there was a shortage and that appellants made no payment toward that shortage, including the portion of the shortage they did not contest.

2. Separate escrow account

Appellants next contend that there is a genuine fact issue as to whether MMA's September 23 demand for placement of funds in a "separate escrow account" complies with section 10's requirement that requested funds be placed in the "Replacement Reserve" account. We disagree.

Appellants point to MMA's first letter, which directs deposit of the requested funds into an escrow account, as evidence of a fact dispute. Even if that argument had merit, any initial confusion was dispelled by the contents of the October 6 and October 16 letters, which expressly incorporate section 10's requirement that requested funds be placed into a reserve account. And it is undisputed that appellants took no action to satisfy MMA's request to remedy the shortage in the reserve account. On this record, we agree with respondents that appellants' argument "elevate[s] form over substance" and conclude that any confusion over MMA's reference to a separate escrow account in the first letter does not create a genuine issue of material fact to preclude summary judgment.

3. Reasonable estimate

Appellants argue that the $538,205 MMA requested was not a "current" estimated cost as provided in section 10 because it represented expenses associated with repairs needed over the next two years. We disagree. The terms of the Reserve Agreement again control. Section 12 provides that "where any determination, judgment or decision is to be rendered by Lender . . . [such act] shall be made or exercised by Lender . . . at its discretion." Accordingly, MMA was authorized to exercise discretion in setting the amount to be placed in the reserve account. The physical-needs assessment estimated that $1,133,905 in repairs were needed over the next 12 years. MMA's request covered only the first two years. Appellants did not produce evidence as to the cost of the repairs needed in the next two years. On this record, we conclude that MMA acted within its discretionary powers in establishing the requested amount.

Appellants' argument that section 2 of the agreement, which allows the lender to increase monthly deposits to ensure sufficient funds following a physical-needs assessment, does not authorize a request for a lump-sum payment likewise fails. Sections 5.1(d) and 10 of the Reserve Agreement give the lender the contractual right to demand a lump deposit where the funds in the reserve account are insufficient to make the replacements "required by the Lender." MMA had the clear authority to require specific repairs and replacements and demand that appellants provide the funds through the reserve account.

4. Intent of the agreement

Finally, appellants contend that there is a dispute as to the intent of the Reserve Agreement. We discern no such dispute. Appellants' apparent reliance on the language of the district court's March 13 order as indicative of ambiguity is misplaced. Appellants construe the court's language stating that "[a] reserve account completely dedicated to [repairs discussed in the physical-needs assessment] would leave nothing for emergencies that may arise" as imputing an additional contract term. But this is an inaccurate reading of the order. The district court clearly expressed its reasoning for granting summary judgment, stating that the Reserve Agreement was "designed to provide additional security for MMA, and [appellants] failed to meet the obligation to provide the funds." The district court's reference to the lender's motivation or rationale for requesting deposit of a particular amount into the reserve account does not alter the default analysis from a legal or factual standpoint. Accordingly, and because the parties do not allege ambiguity, we conclude that the terms of the Reserve Agreement do not create a material-fact issue.

Our review of this record demonstrates no factual dispute as to whether appellants defaulted under the terms of the Reserve Agreement. Because section 3 of the Assignment and Assumption Agreement provides that appellants' bank-loan-documents monetary default entitles respondents to elect the remedy of reversion, the district court did not err in granting declaratory relief to respondents on this basis.

B. Partnership-agreement monetary default

The district court determined that appellants also defaulted under the terms of the Partnership Agreement by failing to pay asset-management fees. Section 3(ii) of the

Assignment and Assumption Agreement provides that a default occurs upon "failure of Assignee and/or the Company to provide any loan, advance, capital contribution or any other payment to the Partnership and/or Paramount as required under the [Member Control Agreement] . . . and/or the Partnership Agreement." Pursuant to the Assignment and Assumption Agreement and Partnership Agreement, appellants assumed the obligations of the Company to pay asset-management fees to one of the limited partners of the Partnership, ATCCF, after October 31, 2006.

On May 1, 2008, through a letter from The Wentwood Companies, ATCCF notified appellants that they owed asset-management fees in the amount of $115,995. Appellants argue that they did not breach the Partnership Agreement because they are not responsible for the portion of the requested fees that accrued prior to their October 2006 transaction between the parties. We are not persuaded by this argument. Appellants acknowledge that they did not pay the $27,840 in asset-management fees for which they are admittedly responsible. It is undisputed that they owe this amount pursuant to the Partnership Agreement.[1] And as the district court noted, appellants' offer to escrow this amount while the liability as to the remaining portion is determined is "insufficient under the contracts." The Partnership Agreement established default upon appellants' failing to make required payments to ATCCF and did not provide for payment by means of escrow.

[1] Appellants attempt to create a factual issue on this undisputed amount by raising equitable defenses and claiming that respondents' failure to pay fees prior to October 31, 2006 operates as a waiver of the contract term. These arguments have no merit. These defenses do not apply as ATCCF, not respondents, is entitled to payment of the management fees.

There is no genuine fact dispute that appellants failed to pay asset-management fees for which they are responsible.

Appellants also challenge summary judgment on the ground that the May 1, 2008 letter from The Wentwood Companies is inadmissible hearsay. Specifically, appellants argue that the letter "lacks sufficient indicia of trustworthiness" and would not be admissible as a business record. *See* Minn. R. Evid. 803(6). We disagree. There is no dispute that the letter was sent to and received by appellants. As respondents note, appellants concede that they are responsible for the asset-management fees that accrued after October 2006, and that they have not paid any portion of these fees. This admission belies any dispute that appellants are in default on their obligation to pay asset-management fees. On this record, the letter has sufficient indicia of trustworthiness to satisfy the rule. Accordingly, we conclude that the district court did not err in determining that appellants are in default under the Assignment and Assumption Agreement on this independent ground.

C. Waste and failure to maintain property in good repair

Appellants next challenge the district court's determination of default based on waste. Section 3(vii) of the Assignment and Assumption Agreement permits respondents to obtain a remedy, including reversion, in "any other event of default under the Bank Loan Documents which is not a Bank Loan Documents Monetary Default that is not cured within sixty (60) days of . . . receipt of written notice of such violation from the lender." The mortgage is one of the bank-loan documents. Section 6 of the mortgage requires that the Property be maintained in good repair and free from deterioration and

waste and that appellants "restore or repair promptly and in a good workmanlike manner all or any part of the Property to the equivalent of its original condition, or such other condition as Lender may approve in writing, in the event of any damage." It further requires appellants to "keep the Property, including improvements, fixtures, equipment, machinery and appliances thereon in good repair" and to replace the same "when necessary to keep such items in good repair." To establish a default under section 3(vii) of the Assignment and Assumption Agreement, respondents must show that appellants (1) failed to meet the obligations set forth in section 6 of the mortgage and (2) did not cure the failure within 60 days of receiving written notice from MMA.

On July 20, 2008, MMA notified appellants by letter of the poor condition of the Property. The letter emphasized that appellants needed to repair two of the apartment-complex roofs "without delay." The letter identified deficiencies due to damage and aging on the roofs of three other buildings, safety concerns in the parking lot, problems with gutters and balcony railings, and water damage and missing appliances in some of the units. Appellants acknowledge that improvements were needed, and do not dispute that they did not repair the two roofs within 60 days of the demand. Rather, appellants argue that the district court was not in a position to determine whether appellants defaulted on their obligations because the covenants of good repair require the court to "examine the property's condition." We disagree. MMA provided sufficient written notice under section 6 of the mortgage that the property was in poor repair and needed immediate attention. Although the record indicates that appellants took some steps to schedule repairs in recognition of the need to make repairs, no work was completed.

Because appellants did not restore or repair the property within 60 days, there was a corresponding default under section 3(vii) of the Assignment and Assumption Agreement, and respondents were entitled to seek a remedy. Appellants have not shown a genuine issue of material fact on this ground.

In sum, the district court did not err in determining that there are three independent events of default under the Assignment and Assumption Agreement. Appellants have not produced evidence creating a genuine issue of material fact as to the existence of these defaults. At best, they have created "metaphysical doubt" as to factual issues. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Accordingly, the district court correctly granted a declaratory judgment in favor of respondents.

D. Denial of further discovery

Finally, appellants argue that the district court improperly denied additional time for discovery pursuant to Minn. R. Civ. P. 56.06. Requests to continue consideration of a summary-judgment motion "should be liberally granted," especially when "the party seeking the continuance is doing so because of a claim of insufficient time to conduct discovery." *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982). "A district court's decision to deny a motion for a continuance to conduct discovery is reviewed under an abuse-of-discretion standard." *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). Here, the district court noted that the dispositive legal issues turned on contract terms and "events have taken place which [appellants] cannot dispute, even with further discovery." We agree. And as a practical matter, appellants had almost three months after the November 13 summary-

judgment hearing to conduct additional investigation and discovery and attempt to supplement the court record. Appellants did not do so. On this record, we conclude that the district court did not abuse its discretion in denying appellants' request to delay the summary-judgment motion to permit discovery.

II. The district court correctly dismissed appellants' counterclaims.

Appellants contend that their first and second counterclaims must be reinstated consistent with the requested reversal of the district court's declaratory judgment.[2] Appellants' first counterclaim seeks a declaration that appellants were not in default and that respondents were not authorized to remove appellants from the Company and obtain appellants' interest through reversion. Their second counterclaim seeks to enjoin respondents from asserting ownership of appellants' interest or interfering with appellants' membership in the Company. The district court determined that these counterclaims were moot based on the declaratory judgment. An issue may be moot when an event makes an order for effective relief impossible or a decision on the merits unnecessary. *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997).

Appellants acknowledge that the parties' claims are "mutually exclusive." We agree. Appellants' counterclaims cannot survive if respondents have already been given the opposite relief. Because we affirm the district court's grant of declaratory relief to respondents and because that affirmance is dispositive of appellants' counterclaims, the counterclaims are subject to summary dismissal.

[2] Appellants do not challenge the dismissal of their unjust-enrichment claim.

III. The district court did not abuse its discretion by denying appellants' motion to amend their pleadings and the scheduling order.

The decision whether to permit a party to amend its pleadings is within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "Whether the district court has abused its discretion in ruling on a motion to amend may turn on whether it was correct in an underlying legal ruling." *Doe v. F.P.*, 667 N.W.2d 493, 500-01 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). A pretrial scheduling order "shall not be modified except by leave of court upon a showing of good cause." Minn. R. Civ. P. 16.02.

The district court's January 12, 2009 scheduling order set April 3 as the deadline for joining additional parties and May 15 as the deadline for hearing nondispositive motions. Appellants' original counsel withdrew from representation on March 26. On June 8, nearly one month after the deadline for hearing nondispositive motions, appellants' new counsel filed a motion seeking to modify the scheduling order, to allow joinder of MMA, and to add a claim under Minn. Stat. § 322B.383 (2008). The district court denied appellants' motions, stating that they were "procedurally defective and untimely" and that "no good cause or unusual circumstances" existed to warrant modification of the scheduling order.

Appellants cite *Cotroneo v. Pilney*, 343 N.W.2d 645, 649 (Minn. 1984), for the proposition that the potential prejudice to the parties, impact of modification at the present state of the litigation, and appellants' lack of bad faith or willfulness favor modification of the scheduling order to permit appellants to present their motions. We

disagree. Appellants' request to extend the scheduling order was untimely. As the district court observed, "[e]xcept in unusual circumstances, a motion to extend deadlines under a scheduling order shall be made before the expiration of the deadline." *See* Minn. R. Gen. Pract. 111.04. And we note that appellants knew of MMA's involvement in the underlying events of default but made no effort to bring MMA into the litigation within the time limit established in the scheduling order. On this record, we conclude that the district court was well within its broad discretion in determining that appellants did not show good cause to justify modifying the scheduling order and permitting their motions.

Affirmed.