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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1120**

Gerald Hummell,
Respondent,

vs.

Edina Realty, Inc., et al.,
Appellants.

**Filed April 21, 2009
Reversed
Stoneburner, Judge**

Dakota County District Court
File No. 19C908006457

Bradley Kirscher, Aase, Engel & Kirscher, P.L.L.C., Suite 255, 180 East Fifth Street,
St. Paul, MN 55101 (for respondent)

Stanford P. Hill, Charles E. Lundberg, Mark R. Bradford, Bassford Remele, P.A., Suite
3800, 33 South Sixth Street, Minneapolis, MN 55402–3707 (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and
Poritsky, Judge.*

UNPUBLISHED OPINION

STONEBURNER, Judge

In this case arising out of the sale of residential real estate, appellants challenge
the district court's holding that respondents' action alleging misrepresentation of the

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

amount of the home's finished square feet is outside the scope of the arbitration agreement under which the parties agreed to arbitrate "[a]ny dispute . . . about or relating to the physical condition of the property . . . including claims of misrepresentation" This court construed the appeal as from the denial of an application to compel arbitration and accepted review. Because the action plainly involves the physical condition of the property, we reverse.

FACTS

Respondents Gerald and Ann Hummell¹ signed a purchase agreement in May 2004 to buy a home in Lakeville, Minnesota. The Hummells were represented at the sale by appellant Karen Keeler. The sellers were represented by appellant Tamara Reck. Both Keeler and Reck were employees of appellant Edina Realty, Inc. (collectively, the agents). The Hummells and the agents also signed an Arbitration Disclosure and Residential Real Property Arbitration Agreement (arbitration agreement) providing, in relevant part, that "[a]ny dispute between the undersigned parties . . . about or relating to the physical condition of the property . . . including claims of . . . misrepresentation . . . shall be settled by binding arbitration."

In January 2008, the Hummells sued the agents, alleging breach of contract, negligence, breach of duty to disclose, fraud, and consumer fraud, based on their claim that the agents misrepresented the finished square footage of the home, which is 348 square feet less than was represented. The agents asserted that the arbitration agreement

¹ The complaint filed with the district court lists both Gerald Hummell and Ann Hummell as plaintiffs in this case. Inexplicably, the district court order listed only Gerald Hummell as the plaintiff in the heading, but repeatedly refers to plural plaintiffs.

deprived the district court of jurisdiction. The district court held that the action does not involve the physical condition of the property and is therefore outside the scope of the arbitration agreement. The agents appealed. This court, in an order dated July 30, 2008, construed the appeal as the denial of an application to compel arbitration and accepted review.²

D E C I S I O N

We review de novo an order denying an application to compel arbitration. *Cnty. Partners Designs, Inc. v. City of Lonsdale*, 697 N.W.2d 629, 632 (Minn. App. 2005). “When considering a motion to compel arbitration, the court’s inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement.” *Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn. App. 1993).

The Hummells challenge the validity of the agreement for the first time on appeal. This court generally does not address matters not argued to or considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Here, the district court found that the Hummells signed the arbitration agreement and that the arbitration agreement is “virtually identical to those interpreted by relevant caselaw.” “[A] written agreement to arbitrate is presumptively ‘valid, enforceable, and irrevocable.’” *Cnty. Partners Designs*, 697 N.W.2d at 632 (quoting Minn. Stat. § 572.08 (2008)). We decline to review

² Because we have construed the appeal as from an order denying an application to compel arbitration, we decline to review the Hummells’ claim on appeal that the agents failed to move the district court to compel arbitration. *See* Minn. R. Civ. App. P. 140.01 (stating that no petition for rehearing is allowed in the court of appeals).

the validity of the agreement and conclude that the only issue on appeal is whether the Hummells' claims are within the scope of the arbitration agreement.

“A court examines the language of the parties' agreement to determine what issues they intended to arbitrate.” *Heyer v. Moldenhauer*, 538 N.W.2d 714, 716 (Minn. App. 1995). The district court concluded that “physical condition” disputes referenced in the agreement are limited to adverse physical conditions going to the quality of the property which interfere with ability to use and enjoy the property, i.e. “conditions you would find on a property disclosure statement.” The district court concluded that the alleged misrepresentation about the number of square feet affected “primarily the property's value to the buyer and not the property's physical quality.” We disagree and find no basis in the law for the distinction made by the district court restricting the scope of the plain language of this real-estate-arbitration agreement. The number of finished square feet in a property plainly relates to the physical condition of that property, and the district court erred by concluding that the Hummells' action is outside the scope of the arbitration agreement.

Reversed.