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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1105**

Brian T. Carlson, et al.,
Appellants,

vs.

Bloomington Housing Partners II,
Respondent.

**Filed August 19, 2008
Affirmed in part and reversed and remanded in part; motion granted in part
Peterson, Judge**

Hennepin County District Court
File No. 27-CV-05-005593

Brian T. Carlson, PO Box 406, Crosslake, MN 56442 (for appellants)

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Minneapolis, MN 55402 (for respondent)

Considered and decided by Peterson, Presiding Judge; Toussaint, Chief Judge; and
Kalitowski, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

On appeal from a summary judgment in this condominium-conveyance dispute, appellant-buyers argue that (1) the district court abused its discretion by not continuing the summary-judgment proceedings; (2) factual questions existed regarding whether the purchase agreement was a valid contract; (3) respondent-seller failed to make adequate

and timely disclosure under Minn. Stat. § 515B.4-101 to 108; (4) respondent should not have been allowed to use the statutory cancellation process under Minn. Stat. § 559.21, and, in any event, the statutory cancellation was ineffective; (5) appellants should have been allowed to amend their complaint; and (6) respondents were not entitled to attorney fees, and the amount awarded was excessive. Respondent-seller seeks review of the district court's reduction of the attorney-fee award to respondent by the amount of profit realized on resale of the unit originally designated for appellants. We affirm the summary judgment for respondent, reverse the reduction of the attorney-fee award and remand with instructions to enter judgment for the full amount of fees found reasonable by the district court, and grant in part respondent's motion to strike.

FACTS

On April 4, 2004, appellants Brian and Susan Carlson entered into a purchase agreement with Bloomington Housing Partners I (BHPI) to buy a townhome-style condominium unit in a common-interest community named Village on 9 Mile Creek (the village). The village was set up under the Minnesota Common Interest Community Act, and construction was scheduled to begin in 2004. When completed, the village was planned to include both flat-style and townhome-style condominium units. Before entering into the purchase agreement, Brian Carlson was provided with a disclosure statement for the village and signed a receipt for it.

In October 2004, appellants decided that they would prefer a less-expensive flat-style condominium unit in the village. The flat-style units were being sold by respondent Bloomington Housing Partners II (BHPII). BHPI and respondent are two entities owned

and managed by the same individuals and entities, and they share a sales office, sales personnel, form purchase agreements, and association and disclosure statements.

BPHI agreed to release appellants from the first purchase agreement on the condition that they contemporaneously execute a purchase agreement for a flat-style condominium unit. On October 10, 2004, appellants executed documents (1) cancelling the first purchase agreement, (2) providing for some of the earnest money paid at the time of the first purchase agreement to be applied to the second purchase agreement and the balance to be refunded to appellants, and (3) entering into a purchase agreement with respondent for the second condominium.

In a November 25, 2004 letter, appellants requested a disclosure statement for the second purchase agreement. On December 3, 2004, respondent's counsel sent appellants a second copy of the disclosure statement originally provided to appellants in April 2004. Respondent noted that the same disclosure statement covered both the townhome- and flat-style condominium units in the village.

On December 6, 2004, appellants served respondent with a notice of cancellation of the second purchase agreement. In a December 14, 2004 letter, respondent's counsel told appellants that the notice of cancellation was ineffective and that respondent looked forward to closing pursuant to the second purchase agreement. Ultimately, respondent determined that appellants were unwilling to comply with the second purchase agreement, and on March 25, 2005, respondent began a statutory cancellation of the second purchase agreement.

Appellants brought this action against respondent alleging contract-law claims and claims related to respondent's failure to provide a second disclosure statement before the second purchase agreement was executed and seeking to enjoin the cancellation of the purchase agreement by the respondents.

Appellants moved to compel discovery and for summary judgment. Respondent also moved for summary judgment. The district court denied appellants' motions, granted summary judgment for respondent, and awarded respondent attorney fees.

In this appeal, appellants challenge the summary judgment for and award of attorney fees to respondent.¹ By notice of review, respondent challenges the district court's reduction of the attorney-fee award incurred by the amount of profit realized on the sale of the unit originally designated for appellants.

D E C I S I O N

I.

Respondent argues that this court lacks jurisdiction over the appeal from the March 6, 2007 order granting summary judgment and the corresponding March 9, 2007 judgment because neither is referred to in the notice of appeal. By order dated July 31, 2007, this court has already rejected essentially the same argument, noting that appellants' statement of the case referred to the March 6, 2007 summary-judgment order. The reference to the March 6 order gave respondent sufficient notice that appellants

¹In an earlier appeal, this court affirmed the district court's denial of appellants' motion for a temporary injunction prohibiting cancellation of the purchase agreement by respondent. *Carlson v. Bloomington Housing Partners II*, No. A05-1324 2006 WL 1073194 (Minn. App. Apr. 25, 2006).

intended to challenge the summary judgment for respondent. *See Kelly v. Kelly*, 371 N.W.2d 193, 195-96 (Minn. 1985) (stating that notice of appeal is liberally construed in favor of sufficiency and is not insufficient because of defects that could not have been misleading).

Respondent also moves to strike volume VIII of the appendix to appellants' brief, which contains certified copies of documents filed with the Hennepin County Recorder. The documents are a declaration, an amended declaration, and a supplemental declaration, recorded, respectively, in June, July, and September 2005; and three cancelled certificates of title. The original declaration was presented to the district court as exhibit L to Brian Carlson's July 28, 2006 affidavit. Appellants' letter accompanying appendix volume VIII indicates that the other documents in that volume were not presented to the district court.

Appellants assert that the documents not presented to the district court can be considered by this court because they are publicly available resources. The record on appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. But this court may consider publicly available legal resources that were not presented to the district court. *See Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 340 n.3 (Minn. 1995) (noting that court may consider cases, statutes, rules and proposed rules set out in the Federal Register, and publicly available articles not presented to district court); *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 376-77 (Minn. App. 1992) (declining to strike law-review articles and cases from other jurisdictions because

they are legal resources), *review denied* (Minn. Mar. 26, 1992). Because the documents in appendix volume VIII are not the type of legal resources to which the exception for publicly available documents typically applies, we decline to apply it and grant respondent's motion to strike as to the documents not presented to the district court.

II.

Appellants argue that the district court abused its discretion in denying their request to continue the summary-judgment motions to permit further discovery by appellants.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court . . . may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Minn. R. Civ. P. 56.06.

“The decision to grant or deny a continuance is within the district court's sound discretion and will not be reversed absent an abuse of discretion.” *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. App. 2006). When considering whether to grant a continuance, a court must determine whether the party has a good-faith belief that additional discovery will uncover material facts. *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. App. 2003). An affidavit filed pursuant to Minn. R. Civ. P. 56.06 “must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” *Id.*

In an affidavit supporting appellants' motion to compel discovery, Brian Carlson stated that respondent answered appellants' discovery requests "with incomplete, inaccurate and evasive answers," preventing appellants from obtaining information needed to address the parties' summary-judgment motions and prepare for trial. Neither Brian Carlson's affidavit nor the attached exhibits (respondent's responses to appellants' discovery requests) specify the evidence needed by appellants to allow them to proceed with the summary-judgment motions and prepare for trial. Appellants also sent a letter, dated July 14, 2006, to respondent requesting more complete responses to appellants' discovery requests. To the extent that the letter identifies the information sought, it is not apparent that the information would lead to evidence of material facts. Accordingly, the district court did not abuse its discretion in denying a continuance.

III.

On appeal from summary judgment, we review the record to "determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the record "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). No genuine issue of material fact exists if the evidence "merely creat[es] a metaphysical doubt as to a factual issue." *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 886-87 (Minn. 2006).

Disclosure-statement receipt

Appellants argue that (1) by including the April 2, 2004 disclosure-statement receipt with the copy of the signed purchase agreement provided to appellants, respondent materially altered a contract term; and (2) the alteration resulted in a counteroffer by respondent rather than an acceptance of the purchase agreement. The receipt was simply an acknowledgment by appellant that he had received a disclosure statement, including exhibits, for the village and did not alter any term of the purchase agreement. Accordingly, appellants' argument fails.

Indefiniteness

“The law does not favor destruction of a contract for indefiniteness.” *Hill v. Okay Constr. Co.*, 312 Minn. 324, 333, 252 N.W.2d 107, 114 (1977). In order for a contract to be specifically enforced, the parties need not agree on every possible point; rather, the law requires that the parties' intent as to fundamental terms be reasonably certain. *Id.* at 332, 252 N.W.2d at 114.

Appellants argue that the purchase agreement, which contained a base price for a finished condominium, was void for indefiniteness because it did not specify the materials included in the base price or the cost of upgrades for various items, including molding, countertops, and flooring. The lack of specificity regarding such items did not render the purchase agreement void. *Cf. Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979) (listing essential terms of contract for sale of real property, including down payment, installments, interest, and time of conveyance).

Option contract

A contract of sale . . . must be bilateral in its obligation and if the contract binds one party to sell and the other party to purchase the property for a stipulated price then it is a contract of sale and purchase, the minds of the parties having met on the proposition and both having assented thereto; but if it gives to the second party the mere privilege of buying the property if he chooses, it is an option.

Wurde mann v. Hjelm, 257 Minn. 450, 461, 102 N.W.2d 811, 818 (1960), *cert. denied*, 364 U.S. 894 (1960).

Appellants argue that the purchase agreement was an unenforceable option contract because the declaration states that respondent is under no obligation to purchase additional real estate and the unit designated for appellants was to be built on the additional real estate. But paragraph two of the purchase agreement, which was the contract between the parties, expressly obligated respondent to build the unit described therein.

Citing *Rooney v. Dayton-Hudson Corp.*, 310 Minn. 256-57, 264, 246 N.W.2d 170, 174 (1976), appellants also argue that the purchase agreement is an option contract because the agreement limits respondent's remedy to retaining appellants' deposit as liquidated damages if appellants default. But unlike the purchase agreement in this case, the agreement in *Rooney* stated that if the buyer failed to perform, the seller shall retain certain amounts as liquidated damages and then stated that the seller "shall have no further remedies pursuant to any agreement between the parties nor under law or equity." *Id.* at 259-60, 246 N.W.2d at 172. The purchase agreement here states that if the buyer defaults, the seller may terminate the agreement and "all earnest money and deposits (if

any) paid by Buyer shall be retained by Seller, with interest, as liquidated damages,” but the agreement does not limit respondent’s remedies. Appellants have not identified any authority that indicates that a liquidated-damages clause, by itself, limits respondent’s remedies and makes a purchase agreement an option contract. *See John v. Timm*, 153 Minn. 401, 405 190 N.W. 890, 891-92 (1922) (holding that provision for forfeiture of earnest money upon vendee’s default did not limit vendor’s remedy to forfeiture and vendor could demand specific performance).

Escrow-agent signature

Appellants argue that the purchase agreement was void because the escrow agreement for earnest money was not signed by the escrow agent. Appellants cite no authority supporting their position, and the authority that we have found indirectly supports the contrary position. *See Simplex Supplies, Inc. v. Abhe & Svoboda, Inc.*, 586 N.W.2d 797, 801-02 (Minn. App. 1998) (discussing statute-of-frauds requirement applicable to sale of goods that contract be signed *by party to be charged*), *review denied* (Minn. Feb. 24, 1998). Accordingly, we are not persuaded by appellants’ argument.

Presale contingency

Appellants argue that the purchase agreement was null and void because the presale-contingency clause was not satisfied and respondent did not provide the contractually required notice of waiver to appellants. The presale contingency clause states that respondent is not required to begin construction of a unit until binding purchase agreements exist for the sale of at least 40% of the units planned to be included

in that construction phase and requires prompt notice to a buyer of waiver of the contingency.

Robert Wheaton stated in an affidavit that when appellants entered into the second purchase agreement in October 2004, the presale contingency was no longer relevant because construction of the flat-style units had begun and the construction would have been visible to appellants when they came to respondent's sales office to execute the second purchase agreement. Photographs attached to the affidavit, which show the construction site in September 2004, support Wheaton's assertion.

Presumably, the presale contingency clause was intended to protect respondent from being obligated to build condominium units if too few units were sold and it became unprofitable to proceed with construction. A party to a contract may waive a condition precedent that exists for that party's own benefit. *Steinhilber v. Prairie Pine Mut. Ins. Co.*, 533 N.W.2d 92, 93 (Minn. App. 1995). Waiver is a voluntary relinquishment of a known right. *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 232 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). Waiver is mainly an issue of intent, and intent can be inferred from conduct. *Id.* When conduct is so inconsistent with an intent to assert one's rights as to leave no room for a reasonable inference to the contrary, waiver is determined as a matter of law. *Id.*

Respondent's conduct in proceeding with construction of the flat-style units and attempting to finalize design selections for and close on appellants' unit was so inconsistent with the right to enforce the presale contingency that it constituted waiver as a matter of law. Thus, the only contract term breached by respondent was the

requirement that any notices under the purchase agreement be in writing and either hand-delivered or mailed. Because appellants knew that respondent was proceeding with construction of the flat-style units and that respondent wanted to finalize design selections for and close on appellants' unit, the breach of the notice requirement was not material and did not render the purchase agreement null and void. *See Gaertner v. Rees*, 259 Minn. 299, 303, 107 N.W.2d 365, 368 (1961) (stating that only a material breach or substantial failure of performance justifies rescission); *Steller v. Thomas*, 232 Minn. 275, 282, 285-86, 45 N.W.2d 537, 542-43 (1950) (determining that logger committed material breach when he did not burn brush piles because primary purpose of contract was to clear land for farming).

Minn. Stat. § 515B.4-106

Appellants claim that they were entitled to rescind the purchase agreement or recover damages because respondent failed to comply with Minn. Stat. § 515B.4-106(a) (2004), which requires a seller to deliver to a purchaser a copy of a disclosure statement and amendments to the disclosure statement before conveyance of a unit and permits a purchaser to cancel a purchase agreement “within five days after first receiving the disclosure statement.”² Appellants argue that they should have been provided with an updated disclosure statement when the October 2004 purchase agreement was executed

² We note that Minn. Stat. § 515B.4-106 was substantially amended in 2005. *See* 2005 Minn. Laws, ch. 121, § 37, at 121-22; 1st Spec. Sess. ch. 7, § 23, at 3083-94. Because appellants' receipt of the disclosure statement, execution of the purchase agreement, and attempted rescission occurred in 2004, we apply the prior version of the statute. *See McClelland v. McClelland*, 393 N.W.2d 224, 226 (Minn. App. 1986) (indicating that the current version of the statute should be used unless doing so would create an injustice), *review denied* (Minn. Nov. 17, 1986).

and that respondent was obligated to provide them with updated disclosure statements each time the disclosure statement was amended. But Minn. Stat. § 515B.4-106(a) provides that if a buyer is given a disclosure statement more than five days before execution of the purchase agreement, the purchaser may not cancel the purchase agreement pursuant to section 515B.4-106. The disclosure statement provided to appellants in April 2004 satisfied that condition.

The statute does not require that a buyer be provided with updates each time a disclosure statement is amended. Minn. Stat. § 515B.4-106 (2004) only revives a buyer's rescission period upon an amendment that "materially and adversely" affects a buyer. Appellants cite no factual basis for their claim that expenses per unit increased due to a reduction in the total number of units, and the record does not support appellants' claim that the disclosure statement provided to them was inadequate.

Statutory cancellation

Appellants argue that the cancellation under Minn. Stat. § 559.21 (2006) was ineffective for several reasons. Appellants first argue that Minn. Stat. § 559.21 does not apply because the purchase agreement was an option contract. But as we have already stated, appellants have not shown that the purchase agreement was an option contract.

Appellants also argue that the cancellation was ineffective because respondent unreasonably moved the deadline for design selections up to December 2004. But even if the deadline was moved up, respondent did not begin the cancellation proceeding until March 25, 2005, and appellants had 30 days after that within which to cure the default.

Appellants argue that the cancellation was ineffective because they only breached the design-selection requirement, which is a minor contract condition. But the cancellation was also based on appellants' failure to close the purchase of the property. Because there is no evidence that appellants attempted to close the purchase of the property, the record does not support appellants' contention that respondent blocked their attempts to cure any default.

Appellants argue that they were entitled to a 60-day (rather than a 30-day) period to cure the alleged defaults and the cancellation is void because a misstatement of the number of days to cure is fatally defective to the cancellation. For contracts executed after July 31, 1985, Minn. Stat. § 559.21, subd. 2a, requires a 60-day cure period. But Minn. Stat. § 559.21, subd. 4, provides that purchase agreements that are subject to section 559.21 may be terminated on 30-days notice. Appellants argue that the purchase agreement was not subject to Minn. Stat. § 559.21, and, therefore, the 30-day notice period in subdivision four does not apply. But if the purchase agreement was not subject to Minn. Stat. § 559.21, the 60-day notice period in Minn. Stat. § 559.21, subd. 2a, does not apply, and appellants were not entitled to a 60-day period to cure.

Appellants argue that the district court erred in determining that the statutory cancellation extinguished appellants' statutory claims for rescission and attorney fees. But even if the cancellation did not extinguish appellants' claims, the district court properly granted summary judgment for respondent on those claims because appellants failed to establish a genuine issue of material fact that would entitle them to relief on those claims.

IV.

A district court has broad discretion to decide whether to grant leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion. *Fabio*, 504 N.W.2d at 761. The district court may deny a motion to amend a complaint when no evidence supports the proposed amendment. *Eustis v. David Agency, Inc.*, 417 N.W.2d 295, 299 (Minn. App. 1987).

Appellants sought to amend their complaint by adding claims for unjust enrichment, attorney fees, punitive damages, and violation of the duty of good faith. These claims are based on appellants' claims of discovery violations, invalid cancellation, and inadequate disclosure statement. Because the district court properly granted summary judgment on those claims, it properly denied the motion to amend.

V.

The district court awarded respondent attorney fees under Minn. Stat. § 515B.4-116 (2006), which states:

(a) In addition to any other rights to recover damages, attorney's fees, costs or expenses, whether authorized by this chapter or otherwise, if a declarant or any other person violates any provision of this chapter, or any provision of the declaration, bylaws, or rules and regulations any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The association shall have standing to pursue claims on behalf of the unit owners of two or more units.

(b) The court may award reasonable attorney's fees and costs of litigation to the prevailing party. Punitive damages may be awarded for a willful failure to comply.

We find persuasive decisions by courts in other jurisdictions interpreting similar statutes to authorize an award of fees to a prevailing party. *See e.g., Griffin v. Berkeley S. Condo. Ass'n*, 661 So. 2d 135, 135 (Fla. Dist. Ct. App. 1995) (holding prevailing party was entitled to award of reasonable attorney fees); *Eagle Point Condo. Owners Ass'n v. Coy*, 9 P.3d 898, 904 (Wash. Ct. App. 2000) (explaining that statute granted the court discretion to award a prevailing party attorney fees).

Appellants alleged numerous violations of chapter 515B, all of which failed on summary judgment. The district court found:

With all due respect to [appellants], this case is about \$16,000 in earnest money, an amount only slightly in excess of the conciliation court limit. [Appellants] made a conscious decision not to close on the purchase of the condominium. They therefore were not entitled to the earnest money. Because of [appellants] decision, [respondent] was entitled to the \$16,000 in earnest money. Although Mr. Carlson is very sincere in his beliefs, he did embark on a campaign of litigation resulting in a file that is, at present, five volumes thick. As a result of this extensive litigation, [respondent] has incurred attorneys' fees and costs in the amount of \$76,925.30. To reiterate, [appellants] have created a court file that is five volumes thick and run up the opposing party's attorneys' fees to nearly \$77,000 – all of this in an effort to obtain \$16,000 of earnest money to which [appellants] are not entitled. (footnote omitted)

See also Carlson v. Bloomington Hous. Partners II, No. A05-1324 2006 WL 1073194, at *5 (Minn. App. Apr. 25, 2006) (stating that when respondent refused to allow appellants to rescind purchase agreement, “appellants began developing a laundry list of alleged technical errors in [respondent's] documents”). The district court also found that based

on the documentation submitted by respondent's attorneys, "[t]here is no rational basis to conclude that [the \$76,925.30] amount is unreasonable."

Respondent argues that the district court abused its discretion in reducing the attorney-fee award by the amount of profit realized by respondent on the resale of the unit originally designated for appellants. Minn. Stat. § 515B.4-116 expressly authorizes an award of reasonable attorney fees. The reasonable value of counsel's work is a question of fact and we must uphold the district court's findings on that issue unless they are clearly erroneous. *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973). Although the district court found that the reasonable value of respondent's counsel's work was \$76,925.30, it reduced the attorney-fee award by the amount of respondent's profit on the resale of the unit that appellants had planned to buy. Because the amount of profit realized by respondent on resale is not related to the reasonableness of the attorney fees that respondent incurred in this litigation, there was not a factual basis for the district court to reduce the fee award by that amount, and the district court did not have discretion under the statute to award an amount other than respondent's reasonable attorney fees. Therefore, we reverse the reduction of the attorney-fee award and remand with instructions to enter judgment for the full amount of fees found reasonable by the district court.

Affirmed in part and reversed and remanded in part; motion granted in part.