

A10-2051 & A11-148
STATE OF MINNESOTA
IN
COURT OF APPEALS

Marketline Construction Capital, LLC,

Defendant/Appellant,

v.

City of Maple Grove,
a Minnesota municipal corporation,

Plaintiff/Respondent.

APPELLANT BRIEF

APPEAL FROM THE DISTRICT COURT'S ORDER AND JUDGMENT GRANTING
RESPONDENT CITY OF MAPLE GROVE'S MOTION FOR SUMMARY
JUDGMENT

APPEAL FROM THE DISTRICT COURT'S ORDER AND JUDGMENT GRANTING
RESPONDENT CITY OF MAPLE GROVE'S MOTION FOR ATTORNEY FEES,
COSTS AND DISBURSEMENTS

Hennepin County District Court
Fourth Judicial District
Honorable Charles A. Porter, Jr.

Trial Court No.: 27-CV-10-07095

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STATEMENT OF LEGAL ISSUES

1. Whether the District Court erred in granting summary judgment in favor of the City of Maple Grove.

Marketline timely responded to the City's Motion for Summary Judgment by serving and filing a Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, the Affidavit of Jay Schoo in Opposition to City of Maple Grove's Motion for Summary Judgment, the Affidavit of Brad A. Sinclair in Opposition to Plaintiff's Motion for Summary Judgment, and attached exhibits. (App. 128-75, 210-313).

The district court granted the City's motion for summary judgment, denied Marketline's motion for continuance, and dismissed Marketline's counterclaims with prejudice. (Add. 1; App. 314). The district court determined that the documents at issue were letters of credit because the documents met the definition of a letter of credit, and were entitled "Letter of Credit." (Add. 4; App. 317).

All issues related to summary judgment were preserved for appeal in Marketline's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, the Affidavit of Jay Schoo in Opposition to City of Maple Grove's Motion for Summary Judgment, the Affidavit of Brad A. Sinclair in Opposition to Plaintiff's Motion for Summary Judgment, and attached exhibits. (App. 128-75, 210-313). Further, the issues were preserved by argument of counsel at the September 20, 2010 hearing on the summary judgment motion. (Summ. J. Mot. T. 1-21). Marketline timely appealed from the district court's order granting summary judgment. (App. 393-94). Apposite cases and statutes are:

Minn. R. Civ. P. 56.01 through 56.06

Minn. Stat. § 336.5-101 et seq.

United Shippers Coop. v. Soukup, 459 N.W.2d 343 (Minn. Ct. App. 1990)

2. Whether the District Court erred in dismissing Marketline Construction Capital's Counterclaims.

Marketline timely responded to the City's Motion for Summary Judgment by serving and filing a Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, the Affidavit of Jay Schoo in Opposition to City of Maple Grove's Motion for Summary Judgment, the Affidavit of Brad A. Sinclair in Opposition to Plaintiff's Motion for Summary Judgment, and attached exhibits. (App. 128-75, 210-313). Marketline also served and filed a Motion for Continuance of Plaintiff's Motion for Summary Judgment and the Affidavit of Brad A. Sinclair in Support of Marketline Construction Capital, LLC's Motion for Continuance of Plaintiff's Motion for Summary Judgment. (App. 176-209).

The district court determined that because the documents were letters of credit Marketline's claims for declaratory judgment and reformation must be dismissed. (Add. 5; App. 318). The district court also concluded that Marketline failed to establish essential elements of each of its other counterclaims. (Add. 5; App. 318). The district court further determined that Marketline made no argument in opposition to the City's motion for summary judgment on its counterclaims. (Add. 7; App. 320).

Marketline asserted in its Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, the Affidavit of Jay Schoo in Opposition to City of Maple Grove's Motion for Summary Judgment, and the Affidavit of Brad A. Sinclair in

Opposition to Plaintiff's Motion for Summary Judgment, that genuine issues of material fact existed precluding summary judgment. (App. 128-75). Marketline argued in its Brief for Continuance of Plaintiff's Motion for Summary Judgment that discovery would uncover facts material to its case. (App. 186). Apposite cases and statutes are:

Minn. R. Civ. P. 56.06

Valspar Refinish, Inc. v. Gaylord's Inc., 764 N.W.2d 359, 369 (Minn. 2009)

Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845 (Minn. 1995)

Northern Petrochemical Co. v. U.S. Fire Ins. Co., 277 N.W.2d 408 (Minn. 1979).

3. Whether the District Court erred in denying Marketline Construction Capital's Motion for Continuance to conduct discovery in the form of depositions.

Marketline served and filed a Motion for Continuance of Plaintiff's Motion for Summary Judgment and Affidavit of Brad A. Sinclair in Support of Marketline Construction Capital, LLC's Motion for Continuance of Plaintiff's Motion for Summary Judgment. (App. 176-209).

The district court concluded that because letters of credit are independent of any underlying agreement or understanding of that agreement, any information obtained by a deposition would have no bearing on the "clear agreement between Marketline and [the City]". (Add. 7-8; App. 320-21).

Marketline asserted in its Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and the Affidavit of Brad A. Sinclair in Opposition to Plaintiff's Motion for Summary Judgment, that Marketline was entitled to a continuance to depose a city official with knowledge of this case. (App. 128-75). Marketline also outlined its position that it was entitled to a continuance in its Motion for Continuance of

Plaintiff's Motion for Summary Judgment and the Affidavit of Brad A. Sinclair in Support of Marketline Construction Capital, LLC's Motion for Continuance of Plaintiff's Motion for Summary Judgment. (App. 176-209). Apposite cases and statutes are:

Minn. R. Civ. P. 56.06

Cargill Inc. v. Jorgenson Farms, 719 N.W.2d 226 (Minn. Ct. App. 2006)

Alliance for Metropolitan Stability v. Metropolitan Council, 671 N.W.2d 905 (Minn. Ct. App. 2003)

Rice v. Perl, 320 N.W.2d 407 (Minn. 1982)

4. Whether the District Court erred in granting the City of Maple Grove's Motion for Attorneys' Fees, Costs and Disbursements.

Marketline timely responded to the City's Motion for Attorneys' Fees, Costs and Disbursements by serving and filing a Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees, Costs, and Disbursements and the Affidavit of Brad A. Sinclair in Support of Marketline Construction Capital, LLC's Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees, Costs, and Disbursements. (App. 370-90).

The district court found that under Minn. Stat. § 336.5-111(e), the prevailing party was entitled to attorney's fees and other expenses of litigation, and that the City was the prevailing party. (Add. 10; App. 391). The district court expressed no findings on whether the amount submitted by the City's attorneys was reasonable.

Marketline served and filed a Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees, Costs, and Disbursements and the Affidavit of Brad A. Sinclair in Support of Marketline Construction Capital, LLC's Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees, Costs, and Disbursements. (App.

370-90). Marketline also separately appealed from the district court's award of attorney's fees and costs, which was subsequently consolidated with Marketline's appeal from the order granting summary judgment. (App. 395-96). Apposite cases and statutes are:

Minn. Stat. § 336.5-111(e)

Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619 (Minn. 1988).

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986).

STATEMENT OF THE CASE

The above-entitled matter is before this Court on consolidated appeals from the Hennepin County District Court, Honorable Charles A. Porter, Jr., by Appellant Marketline Construction Capital, LLC. Appellant Marketline Construction Capital, LLC appeals from the District Court's September 23, 2010 Order and September 27, 2010 Judgment granting Appellee City of Maple Grove's Motion for Summary Judgment, denying Appellant's Motion for Continuance, and dismissing Appellant's Counterclaims with prejudice. Appellant Marketline Construction Capital, LLC also appeals from the District Court's November 19, 2010 Order and December 1, 2010 Judgment granting Appellee City of Maple Grove's Motion for Attorneys' Fees, Costs and Disbursements.

Plaintiff City of Maple Grove ("City") initiated this cause of action seeking to recover \$299,660.00 (later reduced to \$228,930.00) against Defendant Marketline Construction Capital, LLC ("Marketline") for an alleged wrongful dishonor of alleged letters of credit issued by Marketline on behalf of Dingman Development Management, LLC ("Dingman"), pursuant to Minn. Stat. § 336.5-111. In its Complaint, the City alleged that it sent written notice to Marketline notifying it that the City intended to draw on the full balance of the alleged letters of credit issued on behalf of Dingman. The City also alleged that it complied with the terms and conditions of each alleged letter of credit by presenting Marketline with the required sight drafts and certificates signed by the City Administrator.

Marketline defended by asserting that it agreed to conditionally answer for the debt of Dingman in the form of third-party guaranties and/or conditional letters of credit. Marketline also contended that the conditions of the guaranties were not met, and

therefore it was not liable under the written third-party guaranties. Marketline also alleged several counterclaims against the City. Marketline alleged claims for negligent misrepresentation, detrimental reliance and estoppel, unjust enrichment, and fraud, deceit or misrepresentation. Marketline also sought a declaratory judgment and reformation/modification of the surety documents.

On August 3, 2010, Marketline served the City with a Notice to Take 30.02(a) Deposition of City of Maple Grove. The noticed deposition was to occur on August 30, 2010. On August 23, 2010, the City served Marketline with a motion for summary judgment. The City sought an order granting its motion and awarding to the City \$228,930.00, the amount allegedly dishonored by Marketline, plus pre-judgment interest accrued from January 29, 2010 and post-judgment interest at the statutory rates; dismissing Marketline's counterclaims; and awarding the City reasonable attorney fees, costs and disbursements. On August 26, 2010, the City contacted Marketline and indicated that the August 30, 2010 deposition would not occur and that depositions would not be conducted prior to the summary judgment hearing. On September 9, 2010, Marketline filed and served a motion for continuance of the summary judgment proceedings in order to conduct depositions.

On September 20, 2010, the parties appeared for argument on the Motion for Summary Judgment and Motion for Continuance. The District Court subsequently granted the City's Motion for Summary Judgment, dismissed Marketline's Counterclaims with prejudice, and denied Marketline's Motion for Continuance by Order filed September 23, 2010. The District Court's Order was silent on the City's request for attorneys' fees, costs and disbursements. Judgment was entered on September 27, 2010.

On October 4, 2010, the City filed a Motion for Attorneys' Fees, Costs and Disbursements. Marketline timely responded to the motion and the parties appeared for argument on October 18, 2010. Marketline subsequently served and filed its Notice of Appeal from the District Court's Order and Judgment granting the City's Motion for Summary Judgment and dismissing Marketline's Counterclaims. As of the date of filing the Notice of Appeal, Marketline had not received the District Court's order on the motion for attorneys' fees, costs and disbursements, and judgment had not been entered. The District Court then granted the City's motion by order filed November 19, 2010 and judgment was entered on December 1, 2010.

On December 13, 2010, this Court ordered the parties to serve and file informal memoranda addressing this Court's jurisdiction over the appeal from the District Court's September 27, 2010 Order granting summary judgment and dismissing the counterclaims (appeal A10-2051). On January 11, 2011, this Court ordered that appeal A10-2051 shall proceed pursuant to the Minnesota Rules of Civil Appellate Procedure.

On January 24, 2011, Marketline appealed from the District Court's Order and Judgment granting the City attorneys' fee, costs and disbursements, and concurrently filed a Motion to Consolidate the two appeals. This Court granted Marketline's Motion to Consolidate by Order dated January 28, 2011.

STATEMENT OF THE FACTS

Dingman and the City entered into Developer's Agreements regarding two real estate developments—Maple Creek Estates and the Preserve at Rush Creek. (App. 233-74). Marketline issued purported letters of credit 06-0713-DD, 04-0713-DD, and 05-0713-DD (“surety documents”) to the City as conditional third-party guaranties on the obligation of Dingman to pay the City special assessments on the real estate development projects. (App. 161, 215-20). The surety documents were to act as guaranties solely for Dingman's obligation under the Developer's Agreements as Dingman is listed as the account party. (App. 215-20). Dingman was to pay the required special assessments semi-annually when due, and the City was to call upon the surety documents only if Dingman was deficient in paying the special assessments and caused a shortage of cash flow for the City. (App. 161, 235-39, 254-56). Further, upon payment of any delinquent special assessments by the developer or by a subsequent sale or transfer of the real estate the City was required to repay to the surety (Marketline) the amount of the delinquent assessments paid. (App. 161-62, 236, 254-55).

The fundamental purpose of the surety documents was to ensure that the City had adequate cash flow to pay its bondholders. (App. 235-39, 254-57). On August 31, 2009, a Voluntary Mortgage Agreement was entered into between Dingman and Bank-West. (App. 278-86). Pursuant to the Voluntary Mortgage Agreement, Dingman's rights, title, and interest in the real estate developments were sold pursuant to Sheriff's Certificate, and Dingman's interests in the real estate terminated on January 4, 2010. (App. 276-88).

The Developer's Agreements provided that upon sale or transfer of the real estate, any unpaid special assessments were to be paid upon sale or transfer of any fee

ownership interest in the developments. (App. 242-43, 261-62). The City attempted to draw on the surety documents after Dingman's rights, title, and interest in the real estate developments were terminated by foreclosure and subsequent sale/transfer. (App. 56-65, 276-88). Upon sale of the real estate and pursuant to the Developer's Agreements, Dingman no longer had any obligations for payment of the special assessments, and Marketline was also released from its obligations on the surety documents. (App. 242-43, 261-62).

The Developer's Agreements provided that the City was only entitled to call upon the surety documents should the City lack sufficient cash flow from the sale of the real estate and collection of the special assessments upon the property. (App. 236, 255). Maple Creek Estates Development consisted of 20 lots and special assessments were placed upon the 20 lots. (App. 165). Sixteen of the 20 lots have been sold and all of the special assessments on the 16 lots have been paid. (App. 165, 289-92). The City had sufficient cash flow to pay the special assessments without the need to call upon Marketline's surety documents. Id. Dingman also developed the Preserve at Rush Creek. The Preserve at Rush Creek consisted of 50 lots subject to special assessments. (App. 165, 290). By June 4, 2010, 42 of the 50 lots had been sold. Id. Sufficient cash flow existed from the prepayment of the special assessments. Id.

On or about January 20, 2010, the City attempted to call upon the surety documents issued by Marketline on behalf of Dingman. On January 29, 2010, Jay Schoo ("Schoo"), president of Marketline, sent the City a letter indicating that Marketline would not tender any money to the City. (App. 231-32). Schoo indicated that the documents

were conditional and issued upon certain understandings of Marketline. Id. Schoo then outlined Marketline's position regarding the surety documents. Id.

Thereafter, the City served Marketline with the Complaint dated March 1, 2010, alleging that Marketline wrongfully dishonored letters of credit pursuant to Minn. Stat. § 336.5-108. (App. 1-6). Marketline timely served an Answer and Counterclaim dated March 16, 2010. (App. 7-22). On August 3, 2010, Marketline served the City with Interrogatories and Document Requests, and a Notice to Take Deposition pursuant to Minn. R. Civ. P. 30.02. (App. 169-70, 210-11). The deposition was scheduled for August 30, 2010. (App. 170, 210).

Subsequently, the City, on August 12, 2010, served Marketline with a Notice of Motion and Motion for Summary Judgment. (App. 170, 23-24). The City's Memorandum of Law in Support of Summary Judgment was served on August 23, 2010. (App. 170, 25-47). On August 26, 2010, the City indicated that it would not produce any person for the deposition scheduled for August 30. (App. 170). The City refused to allow Marketline to conduct the deposition prior to the district court hearing on its Motion for Summary Judgment. Id. The parties conversed on August 27, and Marketline indicated that it was entitled to conduct a deposition and that it desired to depose the person with the most knowledge for the City regarding this action. (App. 170). Marketline was not permitted to conduct any depositions.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY.

A. Standard of Review for Summary Judgment

“A motion for summary judgment must be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” Cargill Inc. v. Jorgenson Farms, 719 N.W.2d 226, 232 (Minn. Ct. App. 2006) (internal quotations and citations omitted). “On appeal from the grant of summary judgment, [the appellate court] must review the record to determine whether there are any genuine issues of material fact and the trial court erred in the application of the law.” Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky, 674 N.W.2d 176, 179 (Minn. 2004). “The reviewing court must view the evidence in a light most favorable to the nonmoving party.” Alliance for Metropolitan Stability v. Metropolitan Council, 671 N.W.2d 905, 918 (Minn. Ct. App. 2003). “Any doubts about the existence of a material fact are resolved in the nonmoving party’s favor.” Id.

“In construing the nature and terms of a letter of credit, the same general principles apply which govern other written contracts.” United Shippers Coop. v. Soukup, 459 N.W.2d 343, 345 (Minn. Ct. App. 1990) (citing Bank of North Carolina v. Rock Island Bank, 570 F.2d 202, 207 (7th Cir. 1978)). “Summary judgment is inappropriate where terms of a contract are at issue and those terms are ambiguous or uncertain.” Lipetzky, 674 N.W.2d at 179 (citation omitted). The trial court’s interpretation of a contract is reviewed de novo on appeal. Holmes v. Watson-Forsberg Co., 471 N.W.2d 109, 111 (Minn. Ct. App. 1991).

B. When Viewing the Evidence in a Light Most Favorable to Marketline Genuine Issues of Material Fact Exist and the District Court Erred in Interpreting the Surety Documents to be Letters of Credit Governed by Article 5 of the UCC as a Matter of Law

Genuine issues of material fact exist as to whether the instruments at issue in this case are letters of credit governed by Article 5 of the UCC or some other form of surety, which would fall outside the scope of Article 5. A letter of credit is a “definite undertaking that satisfies the requirements of section 336.5-104 by an issuer to a beneficiary at the request or for the account of an applicant” Minn. Stat. § 336.5-102(a)(10). “A letter of credit . . . may be issued in any form that is a record and is authenticated (i) by a signature or (ii) in accordance with the agreement of the parties or the standard practice referred to in section 336.5-108(e).” Minn. Stat. § 336.5-104.

The District Court erred in determining that the surety documents at issue in this case were letters of credit as a matter of law. “In construing the nature and terms of a letter of credit, the same general principles apply which govern other written contracts.” Soukup, 459 N.W.2d at 345 (citation omitted). “[A]s a general rule interpretation of a written agreement is a question of fact.” Barclays Bank D.C.O. v. Mercantile Nat’l Bank, 481 F.2d 1224, 1234 (5th Cir. 1973). “Whether a contract exists is generally a question of fact.” Cargill, 719 N.W.2d at 232. Further, “[t]he question of interpretation of language and conduct—the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law.” Barclays, 481 F.2d at 1234 (citing 3 Corbin, Contracts, § 554 at 219 (1966)). Therefore, whether the surety documents at issue in this case are indeed letters of credit is a question of fact and was not appropriate for summary judgment.

Moreover, a letter of credit is defined as “[a]n instrument under which the issuer at a customer’s request, agrees to honor a draft or other demand for payment made by a third party (the beneficiary), as long as the draft or demand complies with specified conditions. . . .” Black’s Law Dictionary, 424 (3d. pocket ed. 2006). A guaranty is defined as “[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance.” Id. at 319. A guaranty is collateral to the primary obligor’s duty, and must be in writing. Id. The Fifth Circuit Court of Appeals has noted: “In fact, there is a vast difference between a guaranty and a letter of credit. The issuer of a credit assumes a primary obligation to the beneficiary as opposed to a secondary liability under a guaranty.” Barclays Bank D.C.O. v. Mercantile Nat’l Bank, 481 F.2d 1224, 1236 (5th Cir. 1973) (citing J. Halls, The Uniform Commercial Code in Minnesota: Article 5—Letters of Credit, 50 Minn. L. Rev. 453, 454 n. 3 (1966)).

The district court clearly relied upon the title of the documents in determining that they are letters of credit. The court indicated that “each [document] is entitled ‘Letter of Credit’” and determined that the documents “meet the definition of ‘letter of credit’ applied by Minnesota courts.” (Add. 4). In so concluding, the district court relied upon United Shippers Coop. v. Soukup in which this Court cited a Colorado decision for the proposition that if a document states that it is a letter of credit then it must be a letter of credit. See 459 N.W.2d at 344-45.

However, Soukup is distinguishable from this case. The section of Article 5 that the Soukup court referenced in its decision is no longer contained in Minn. Stat. §§ 336.5-101 et seq. The quoted section, Minn. Stat. § 336.5-102, has been amended to

include various definitions applicable to Article 5. Further, section 336.5-103, which now codifies the scope of Article 5 of the UCC in Minnesota, does not include the statutory provisions cited by the Soukup court. Also, the Soukup court specifically noted that documents conspicuously labeled letters of credit *issued by a bank* can be letters of credit. The documents at issue in this case were not issued by a bank, but were issued by a limited liability company which provides funding for builders to construct new homes. Therefore, the district court's reliance upon Soukup in determining that these surety documents were letters of credit because they were so labeled was in error.

The Official Comment to UCC 5-103 is instructive on this point. "The label on a document is not conclusive; certain documents labeled 'guaranty' . . . are letters of credit. On the other hand, even *documents that are labeled 'letters of credit' may not constitute letters of credit* under the definition in Section 5-102(a)." U.C.C. § 5-103, cmt. 6 (emphasis added). "[H]ow the parties label their undertaking is *not the conclusive measure* by which the obligation should be judged; rather, *how the obligation functions and what it requires of the issuer* should determine whether a particular instrument should be deemed a letter of credit or something else, such as a guaranty." 1 Williston on Contracts, § 2:23 (4th ed.) (emphasis added). Simply because the surety documents at issue here are labeled "Reduction and Renewal Letter of Credit" and "Amended Letter of Credit" does not conclusively establish that the documents are indeed letters of credit. Id.

The district court erred in determining that the documents at issue here are letters of credit as a matter of law. The court erroneously concluded that the documents are letters of credit simply because the documents are so entitled. (Add. 4). The label on the documents is not conclusive and summary judgment was inappropriate here. In addition,

genuine issues of material fact exist regarding whether the surety documents were letters of credit.¹ Further, Marketline had a good faith belief that genuine issues of material fact would have been discovered at the time of the noticed deposition. The City was to make documents available at the time of the deposition that would have led to genuine issues of material fact precluding summary judgment in this case. (Summ. J. Mot. T. 18-19).

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING MARKETLINE'S COUNTERCLAIMS WITH PREJUDICE

The district court concluded that "Marketline . . . failed to establish essential elements of each of its . . . counterclaims." (Add. 5). The district court erred in granting summary judgment in favor of the City, and dismissing all of Marketline's counterclaims with prejudice. Marketline asserted counterclaims against the City for (1) declaratory judgment; (2) reformation/modification of the agreement; (3) negligent misrepresentation; (4) detrimental reliance/estoppel; (5) unjust enrichment; and (6)

¹ Demand under the surety documents were conditioned upon certain events occurring pursuant to the Developer's Agreements, and were fundamental to the establishment of any liability on behalf of Marketline. The conditions required, before any demand upon Marketline's surety documents, were contained in the Developer's Agreements entered into by Dingman and the City. These conditions clearly indicated that Marketline was only secondarily liable for Dingman's failure to pay the semi-annual installments of special assessments, and only if the City lacked sufficient cash flow from previous pre-paid special assessments to pay the semi-annual payments of special assessments when due, and only if Dingman remained the owner of the real estate in which a special assessment payments were due. Marketline's obligation terminated upon Dingman's transfer of its rights, title, and interest in the property. The City was obligated to collect in full all special assessments outstanding upon transfer of the real estate. Marketline became liable only if Dingman failed to pay special assessments and only if there was a lack of sufficient cash flow from the pre-payment of previous special assessments to pay the existing semi-annual special assessments. The remaining unsold lots of the developments were transferred to Bank-West on January 4, 2010. Any demand made upon Marketline pursuant to the surety documents did not occur until January 20, 2010. On January 20, 2010, Dingman no longer owned the real estate. The City should have required Bank-West to pay all special assessments in full prior to recording any deed or transfer document.

fraud/deceit/misrepresentation. (App. 7-22). Genuine issues of material fact exist regarding Marketline's counterclaims. Furthermore, Marketline was entitled to conduct discovery depositions regarding its counterclaims in order to properly and adequately respond to the City's Motion for Summary Judgment. Therefore, this Court should reverse the order and judgment of the district court dismissing Marketline's counterclaims.

A. Fraud/Deceit/Misrepresentation

"Fraud is . . . a protean legal concept, assuming many shapes and forms." Florenzano v. Olson, 387 N.W.2d 168, 172 (Minn. 1986) (internal quotations and citation omitted). The required elements of a fraud action are: (1) there must be a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer pecuniary damage as a result of the reliance. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986); Flynn v. American Home Prods. Corp., 627 N.W.2d 342, 349 (Minn. Ct. App. 2001). The existence of fraud is generally a question of fact to be determined by the trier of fact. 37 Am. Jur. 2d, Fraud & Deceit, § 502, (2d. ed. 2010).

In its Answer and Counterclaim, Marketline specifically alleged that the City represented to Marketline that its obligation to answer for Dingman could be properly portrayed and memorialized by an agreement called a letter of credit, and that the letter of credit could not be drawn upon and was not an obligation of Marketline until certain

conditions were satisfied. (App. 19-20). It was also quite apparent from Marketline's Answers to Plaintiff's First Set of Interrogatories that [REDACTED] the Administrative Engineering Technician for the City, and [REDACTED], the Director of Public Works, made representations regarding the letters of credit. (App. 112-27). Marketline's opportunity and request to discover the necessary facts to prove its fraud claim was thwarted by the City when it denied Marketline's request to conduct a deposition in this matter. (App. 169-170). At the time Marketline noticed the deposition of a City representative, the litigation had been ongoing for merely five (5) months. (App. 1-6, 169-75, 210). The existence of fraud is a question of fact and summary judgment was therefore inappropriate. Furthermore, Marketline was not given an opportunity to discover the facts necessary to prove its claim of fraud against the City.

The district court also determined that "[i]n light of Marketline's sophistication and experience, it cannot argue that it reasonably relied on representations by City officials in executing the letter of credit." (Add. 6). "Ordinarily, the reasonableness of reliance is a fact question for the jury." Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995). Further, the knowledge and sophistication of the parties is only a factor in determining whether a party may reasonably rely on representations. Veit v. Anderson, 428 N.W.2d 429, 434 (Minn. Ct. App. 1988).

It was therefore inappropriate for the district court to grant summary judgment dismissing Marketline's fraud claim, especially when Marketline was not given an adequate opportunity to conduct discovery. The district court concluded that Marketline failed to establish the elements of fraud. While Marketline acknowledges that it is

entitled to present facts demonstrating genuine issues for trial on the elements of fraud, it must also be given an opportunity to conduct discovery. See Minn. R. Civ. P. 56.06.

B. Negligent Misrepresentation

The district court also determined that Marketline could not demonstrate reasonable reliance on its negligent misrepresentation claim. A claim for negligent misrepresentation requires the plaintiff to show: (1) a duty of reasonable care in conveying information owed by one party to another in the course of a transaction where pecuniary interests are at stake; (2) a breach of that duty by negligently providing false information; (3) reasonable reliance on the misrepresentations, which was a proximate cause of the injuries; and (4) damages. Smith v. Brutger Cos., 569 N.W.2d 408, 414 (Minn. 1997); Flynn, 627 N.W.2d at 350-51. Whether a party's reliance is reasonable depends on its intelligence, experience and opportunity to investigate. Valspar Refinish, Inc. v. Gaylord's Inc., 764 N.W.2d 359, 369 (Minn. 2009). "Ordinarily, the reasonableness of reliance is a fact question for the jury." Nicollet Restoration, 533 N.W.2d at 848.

The district court cited "Marketline's sophistication and experience" as the reason it could not demonstrate reasonable reliance. "The facts and circumstances surrounding the situation are the best measure of whether there is reliance on representations or not." 22 Dunnell Minn. Dig., Fraud § 2.04, 345. The fact that a party is a keen businessman is a consideration in determining whether he relied on alleged misrepresentations. Id. at 346. But, the knowledge and sophistication of the parties is only a factor in determining whether a party could reasonably rely on representations. Veit, 428 N.W.2d at 434.

Depositions may have also revealed that negligent misrepresentations were made by city officials. It was therefore inappropriate for the district court to grant summary judgment dismissing Marketline's negligent misrepresentation claim, especially when Marketline was not given an adequate opportunity to conduct discovery. Marketline should have been given an opportunity to conduct further discovery by way of deposition. See Minn. R. Civ. P. 56.06.

C. **Detrimental Reliance/Estoppel**

Under the doctrine of promissory estoppel, a promise may be enforced when (1) it is clear and definite, (2) the promisor intended to induce the promisee to rely on the promise, (3) the promisee detrimentally relied on the promise, and (4) enforcement of the promise is required to prevent an injustice. Deli v. Univ. of Minnesota, 578 N.W.2d 779, 781 (Minn. Ct. App. 1998). The district court concluded that Marketline did not suffer "some injustice as a result of entering into agreements with the developers and [the City]." (Add. 7). "Estoppel depends on the facts of each case and is ordinarily a fact question for the jury to decide." Northern Petrochemical Co. v. U.S. Fire Ins. Co., 277 N.W.2d 408, 410 (Minn. 1979). "[E]stablishing the reasonableness of the reliance is essential to any cause of action in which detrimental reliance is an element." Nicollet Restoration, 533 N.W.2d at 848. "Ordinarily, the reasonableness of reliance is a fact question for the jury." Id.

Genuine issues of material fact exist regarding Marketline's claims for detrimental reliance/estoppel. Marketline responded to the City's First Set of Interrogatories, which was the only form of discovery permitted in this matter, by asserting that the City made certain representations which induced Marketline to draft

and issue the surety documents entitled “Letter of Credit.” (App. 113). The City denied Marketline its opportunity to conduct further discovery on these issues. (Summ. J. Mot. T. 4; App. 169-75, 210-15). Marketline was denied an opportunity to develop the facts necessary to prove the essential elements of its claim by the City and the district court’s order granting summary judgment. Summary judgment was premature and inappropriate in this matter.

D. Unjust Enrichment

The district court also concluded that Marketline could not prove its claim of unjust enrichment because it made “no allegations of illegal or unlawful activity, and the record contains no evidence that any Maple Grove official acted unlawfully in its dealings with Marketline.” (Add. 5). The district court concluded that “[u]njust enrichment claims cannot lie simply because one party has benefited at the expense of another – there must actually be some unlawful or illegal activity for such a claim to move forward.” *Id.* (citing Holman v. CPT Corp., 457 N.W.2d 740, 745 (Minn. Ct. App. 1990)). The district court erred in its application of the law and therefore summary judgment was improper. Nicollet Restoration, 533 N.W.2d at 847.

To establish unjust enrichment, a “claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit.” Schumacher v. Schumacher, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). And while the district court correctly cited Holman, this Court also noted in its decision that “[a]n action for unjust enrichment may be founded upon failure of consideration, fraud, or mistake, or ‘situations where it would be morally wrong for one party to enrich himself at the

expense of another.” Holman, 457 N.W.2d at 745 (citing Anderson v. DeLisle, 352 N.W.2d 794, 796 (Minn. Ct. App. 1984)). Marketline indeed asserted a claim for fraud against the City and the district court improperly ignored Marketline’s fraud claim in determining that Marketline’s unjust enrichment claim could not move forward.

The district court also incorrectly noted that Marketline made “no allegations of illegal or unlawful activity” by the City. (Add. 5). Marketline asserted a claim for fraud in its Answer and Counterclaim. (App. 19-20). The following exchange also occurred at the summary judgment hearing:

THE COURT: So your allegation is that the City is dishonest?
MR. SINCLAIR: In this case, yes, Your Honor.
THE COURT: In what way are they dishonest?
MR. SINCLAIR: Okay, how they’re dishonest is this - -
THE COURT: You understand you’re charging someone with a
 crime?
MR. SINCLAIR: Yes, Your Honor.

(Sum. J. Mot. T. 17). Marketline should have been afforded an opportunity to depose City officials in order to determine what, if any, representations were made to Marketline related to its fraud and misrepresentation claim, which corresponds with its claim for unjust enrichment.

Further, on August 31, 2009, a Voluntary Mortgage Agreement was entered into between Dingman and Bank-West. (App. 278-87). Pursuant to the Voluntary Mortgage Agreement, Dingman’s rights, title, and interest in the real estate developments were sold pursuant to Sheriff’s Certificate, and Dingman’s interests in the real estate terminated on January 4, 2010. (App. 163-64, 276-88). The surety documents were issued by Marketline on account of Dingman Development. (App. 215-20). It would be unjust to allow the City to collect the funds under the surety document when title to the

development was transferred to Bank-West prior to the City's attempt to draw on the surety documents. (App. 163-64). Thus, this Court should reverse the district court's grant of summary judgment.

III. THE DISTRICT COURT ERRED IN DENYING MARKETLINE'S MOTION FOR CONTINUANCE

A. Standard of Review for Motion for Continuance

"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, 719 N.W.2d at 231. "There is a 'presumption in favor of granting continuances to allow sufficient time for discovery.'" Id. (citing Rice v. Perl, 320 N.W.2d 407, 412 (Minn. 1982)). "When determining whether to grant a continuance, the court considers first, whether the moving party has been diligent in obtaining discovery and, second, whether the moving party seeks further discovery with the good faith belief that material facts will be uncovered, or is merely engaging in a fishing expedition." Id. (internal quotations and citation omitted).

B. The District Court Abused Its Discretion in Denying Marketline's Motion for Continuance

"While it is true that the trial judge has great discretion to determine the procedural calendar of a case, under Rule 56.06 such continuances should be liberally granted." Rice, 320 N.W.2d at 412. "This is especially true when the party seeking the continuance is doing so because of a claim of insufficient time to conduct discovery." Id.

Rule 56.06 provides:

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 refuse the application for judgment or 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. “A continuance or permission to engage in further discovery should not be denied to a party except in the most extreme circumstances.” Rice, 320 N.W.2d at 412 (citation omitted). “As a practical matter, the court should be liberal in granting additional time for purposes of preparing affidavits or discovery if a party has any real reason to believe that facts can be established by such means.” Id. (citation omitted).

(1) Marketline Should Have Been Permitted to Conduct Discovery on Its Counterclaims

The district court abused its discretion when it denied Marketline’s motion for a continuance and concluded that that “discovery would not lead to information helpful to Marketline in this case.” (Add. 7). The district court merely concluded that the documents are letters of credit, and that conducting a deposition would do nothing to aid in interpretation of the documents. (Add. 7-8). The district court ignored the fact that Marketline wished to conduct further discovery to uncover facts material to its counterclaims and properly defending against a grant of summary judgment dismissing its counterclaims. (App. 186).

Marketline asserted counterclaims of fraud/deceit, misrepresentation, detrimental reliance/estoppel, and unjust enrichment. Marketline was diligent in conducting discovery as it served Interrogatories and Document Requests less than five (5) months after serving its Answer and Counterclaim. (App. 203). Marketline also noticed the deposition of a City official prior to the City moving for summary judgment. (App. 203-04). Marketline was not given sufficient time to develop the facts necessary to establish the elements of its counterclaims.

“Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party as is often true in fraud . . . cases.” Rice, 320 N.W.2d at 412 (citation omitted). It is difficult to prove fraud without assessing all of the circumstantial evidence. Id. at 413 (citation omitted). The district court should have granted Marketline’s motion for continuance and allowed Marketline to conduct a deposition of a City official with knowledge of the issues presented in this litigation. Marketline was diligent in conducting discovery, and also responding to the City’s written discovery. (App.112-27, 203-04). Marketline also noticed the deposition prior to the City moving for summary judgment, and less than five (5) months after serving its Answer and Counterclaim. (App. 203-04). Further, Marketline acted with a good faith belief that material facts would be uncovered and was not merely engaging in a fishing expedition as it sought facts necessary to develop its counterclaims and “material to its case.” (App. 186, 203-09). For all of these reasons, this Court should reverse the district court’s grant of summary judgment dismissing Marketline’s counterclaims with prejudice.

(2) Marketline Should Have Been Permitted to Conduct Discovery Pursuant to Rule 56.06

Marketline also should have been granted a continuance to conduct further discovery as this litigation was in its infancy and Marketline was diligent in moving discovery along. Marketline was served with a Summons and Complaint on March 1, 2010. (App. 203). Marketline served its Answer and Counterclaim on March 16, 2010. Id. Less than five months elapsed when the parties began conducting written discovery. Marketline answered the City’s written discovery requests, and served Interrogatories and Document Requests on August 3, 2010. (App. 203). Marketline also served a Rule 30.02

deposition request on August 3. Id. The deposition was noticed for August 30. Id. On August 12, 2010, the City served Marketline with a Notice of Motion for Summary Judgment, and served its supporting brief on August 23, 2010. (App. 204). On August 26, 2010, the City indicated to Marketline that it would not produce a person for the August 30 deposition and would not allow Marketline to depose a city official prior to the summary judgment hearing. Id.

In Cargill, the appellant argued that the district court abused its discretion in denying its request for a continuance to conduct discovery before ruling on a summary judgment motion. 719 N.W.2d at 231. The appellant had approximately seven months to conduct discovery from the time it served its complaint until the summary judgment hearing. This Court noted that the appellant failed to serve any interrogatories, requests for production of documents or admission, or notices of depositions of parties or witnesses. Id. This Court affirmed the district court's conclusion that the appellant had not been diligent in conducting discovery and was not entitled to a continuance. Id. at 232.

This case can be distinguished from Cargill. Here, Marketline served both interrogatories and document requests less than five months after serving its Answer and Counterclaim. (App. 203). Marketline also served a deposition notice within the same time period. (App. 203-04). Further, Marketline responded to discovery requests about five months after it served its Answer and Counterclaim. (App. 112-27). Marketline, unlike the appellant in Cargill, was diligent in seeking and pursuing discovery in this matter. There is a presumption in favor of granting continuances to allow sufficient time for discovery, and the district court abused its discretion in not affording Marketline

sufficient time for discovery. Cargill, 719 N.W.2d at 231 (citing Rice, 320 N.W.2d at 412).

Rule 56.06 provides that the court may grant a continuance if it appears from the affidavits that the nonmoving party cannot present facts essential to justify the party's opposition. Minn. R. Civ. P. 56.06. "A rule 56.06 affidavit 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." Alliance Metropolitan, 671 N.W.2d at 919. The Affidavit of Brad A. Sinclair meets these requirements, and the district court abused its discretion in not awarding the continuance. (App. 203-09).

The Affidavit outlined the specific evidence that Marketline expected to obtain by conducting a deposition, that it was necessary to conduct a deposition to discover the evidence, and that the City prevented Marketline from conducting the deposition even though the deposition was properly noticed prior to the summary judgment motion. (App. 203-09). Marketline further indicated in its Brief for Continuance of Plaintiff's Motion for Summary Judgment that it had a good faith belief that discovery would uncover facts material to its case, including the counterclaims. (App. 186).

This litigation was commenced on March 1, 2010, and Marketline served its discovery, including noticing a deposition, less than five months after serving its Answer and Counterclaim. Marketline moved for a continuance prior to the summary judgment hearing. Marketline filed an Affidavit outlining the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery. The district court denied the continuance and granted summary judgment against Marketline. "A continuance or permission to engage in further discovery should

not be denied to a party except in the most extreme circumstances.” Rice, 320 N.W.2d at 412 (citation omitted). The district court therefore abused its discretion in denying Marketline a continuance in order to conduct further discovery regarding its case and counterclaims.

IV. THE DISTRICT COURT ERRED IN GRANTING THE CITY’S MOTION FOR ATTORNEYS’ FEES, COSTS AND DISBURSEMENTS

A. Standard of Review for Attorney’s Fees

“The amount of attorney’s fees ordinarily lies within the discretion of the trial court.” Nelson v. Master Vaccine, Inc., 382 N.W.2d 261, 266 (Minn. Ct. App. 1986) (citation omitted). “What constitutes the reasonable value of the legal services is a question of fact to be determined by the evidence submitted, the facts disclosed by the record of the proceedings, and the court’s own knowledge of the case.” City of Minnetonka v. Carlson, 298 N.W.2d 763, 765 (Minn. 1980). Thus, the amount of reasonable attorney’s fees awarded by the district court is subject to an abuse of discretion standard of review.

B. The Award of Attorney’s Fees, Costs and Disbursements Must be Reversed If This Court Reverses the District Court’s Grant of Summary Judgment In Favor of the City

Marketline recognizes that Minn. Stat. § 336.5-111(e) provides: “Reasonable attorney’s fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.” The City moved for attorney’s fees, costs and disbursements in its original motion for summary judgment, however, the district court did not address the issue in its September 23, 2010 Order and Memorandum. Thus, Marketline was required to separately appeal the award of

attorney's fees, costs and disbursements, which the district court awarded after an additional motion and hearing, by separate Order dated November 19, 2010.

The district court's award of attorney's fees, costs and disbursements pursuant to Minn. Stat. § 336.5-111(e) must be reversed if this Court reverses the district court's grant of summary judgment. Section 336.5-111(e) only permits an award of attorney's fees and expenses to the prevailing party. The City would not be considered a prevailing party if this Court reverses the summary judgment. Therefore, this Court must reverse the district court's award of attorney's fees, costs and disbursements if the grant of summary judgment is reversed. Alternatively, if this Court affirms the district court's grant of summary judgment in favor of the City, the amount of attorney's fees should still be reversed or significantly reduced as excessive, unreasonable, and unnecessary.

C. The District Court Abused Its Discretion in Awarding the City Attorney's Fees in the Amount of \$45,459

The district court did not make any findings regarding the reasonableness of the amount of attorney's fees it awarded to the City. In determining a reasonable amount of attorney's fees, this Court must consider several factors including (1) the time and labor required; (2) the nature and difficulty of the responsibility assumed; (3) the amount involved and the results obtained; (4) the fees customarily charged for similar legal services; (5) the experience, reputation and ability of counsel; and (6) the fee arrangement existing between counsel and the client. Carlson, 298 N.W.2d at 765. The court must exclude from the calculation any hours not reasonably expended. Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619, 629 (Minn. 1988). Further, the district court must make specific findings on the fees sought by the City, and its conclusions must demonstrate that the court specifically scrutinized the hours expended by the City's

attorneys to determine their reasonableness. Id. The district court must not allow an award of attorneys' fees for hours expended that were excessive, redundant, and/or unnecessary. Id.

(1) The Time and Labor Required Did Not Warrant the Award of Attorney's Fees

This lawsuit was commenced in March 2010. (App. 1-6). The district court issued an order granting summary judgment on September 22, 2010. From beginning to end, this litigation lasted seven (7) months, which is relatively short and does not warrant an award of attorney's fees of \$45,459.00. Further, the time and labor required of the City's attorneys in this case is excessive and should be disallowed or significantly reduced.

The City's attorneys performed a total of 273.3 hours of services for the City from February 22, 2010 through October 4, 2010. From March 15, 2010 through September 30, 2010, Marketline's attorney billed 103.1 total hours, more than sixty percent (60%) less time than the City's attorneys. (App. 381-89). This demonstrates that the amount of hours billed by the City's attorneys in this matter is excessive, redundant, and unnecessary. The court must exclude from the calculation any hours not reasonably expended. Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619, 629 (Minn. 1988). This Court should reverse the award of attorney's fees for \$45,459.00 or reduce the amount significantly.

In contrast to the City attorney's fees (\$45,459.00), (Add. 10) Marketline's attorney's fees in this matter were \$13,603.50. (App. 381-89). The City's attorney's fees were more than three (3) times the amount of Marketline's attorney's fees. The amount

of attorneys' fees awarded by the district court in this matter was unreasonable and should be reversed or reduced.

It should also be noted that no depositions were taken in this case. The only discovery conducted was written. The fact that no depositions were taken further indicates that the \$45,459.00 award of attorney's fees was excessive and unreasonable. This matter also did not proceed to trial and was disposed of by motion of the City. The award of \$45,459.00 was excessive and unreasonable.

The time and labor required to litigate this matter did not warrant an award of attorney's fees for \$45,459.00. The 273.3 hours expended by the City's attorneys in this case was excessive, redundant, and unnecessary. This Court should therefore reverse the district court's award of attorney's fees or significantly reduce the amount awarded.

(2) The Nature and Difficulty of the Responsibility Assumed Did Not Warrant the Award of Attorney's Fees

The nature and difficulty of the responsibility assumed by the City's attorneys in this case does not warrant an award of attorney's fees for \$45,459.00. While the City did receive a judgment in its favor, the determinative issue in this case involved the interpretation of surety documents, and whether the documents were letters of credit as asserted by the City, or conditional guaranties as asserted by Marketline. The district court did not afford Marketline a continuance to conduct depositions, and thus did not permit Marketline to conduct discovery on its counterclaims. Thus, this matter was not so complex as to warrant an award of attorney's fees in the amount of \$45,459.00, especially when the case was disposed of by a motion and did not proceed to trial.

The City's attorneys have practiced in the area of municipal law and litigation since 1977. (App. 328). The attorneys have represented the City for approximately 14

years, LMCIT (League of Minnesota Cities Insurance Trust) for nearly 24 years, and have been assigned to over 300 cases. Id. Based on their experience, the nature and difficulty of the responsibility assumed by the City's attorneys in litigating this dispute did not warrant the amount of attorney's fees awarded by the district court.

D. The Award of Attorney's Fees Included Fees That Were Redundant, Unnecessary, and Unreasonable

The City submitted two exhibits describing the work performed on this matter. (App. 332-69). Upon a close examination of the billing statements, it is clear that the City is seeking attorneys' fees for excessive, redundant, and unnecessarily expended hours. This Court can easily see, by way of example, that one of the attorneys reviewed Defendant's Answer and Counterclaims on March 16, 2010 for 0.7 hours. (App. 333). The attorney again reviewed the Counterclaim on March 25, 2010 for 1.25 hours. (App. 335). Also on March 25, 2010, another attorney reviewed the Answer and Counterclaim for 0.3 hours. Id. The attorneys billed the same time entries to both the City and the LMCIT for the exact same work performed. (App. 335, 352). It is unclear whether this is double billing or the total time was split. This is a common pattern throughout the billing statements attached to the City's motion.

Some of the billing statements indicate that the time is split with LMCIT, but others do not. (App. 332-69). The billing statements discussed in this paragraph do not indicate that the time is being split between the City and LMCIT. Therefore, this time is excessive, redundant, and unnecessary and should be disallowed. In total, the City spent over four (4) hours reviewing Marketline's Answer and Counterclaim. These billed hours are redundant and unnecessary, and the district court's award of attorney's fees should be reversed.

Hours not reasonably expended by an attorney should be deducted from an award of attorney's fees. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 542 (Minn. 1986). This Court should reverse the district court's award of attorney's fees. Often the attorneys and paralegal were performing the same work. "Case may be overstaffed . . ." and the attorney's fees should be reduced accordingly. Id. (citation omitted).

If this Court closely examines the billing statements for the City and the LMCIT, it can be seen that in excess of 60 hours were billed for drafting the summary judgment brief. (App. 332-69). Specifically, the billing statements for July 30, 2010 through August 23, 2010 indicate that an attorney spent in excess of 60 hours working on the summary judgment brief. (App. 340-43, 358-361). The City's brief was twenty-three (23) pages in length, and sixty (60) hours expended on drafting one brief is excessive, unnecessary, and unreasonable. (App. 25-47). Nearly one-fourth (1/4) of the total amount of hours billed by the City in this case (273.3 hours) was expended on drafting one brief, which was twenty-three (23) pages in length. These hours do not even include the additional time spent reviewing and revising the brief. The district court abused its discretion in awarding these hours as the hours are excessive and unnecessary. Therefore, this Court should reverse the district court's award of attorney's fees.

The City also seeks to recover attorney's fees for work done on a settlement agreement. (App. 333). No settlement agreement was ever reached in this case nor forwarded to Marketline for review. Therefore, this time should be disallowed as it was unnecessary and unreasonable.

One attorney worked on an opinion letter and conducted legal research on May 4-6, 2010. (App. 337). The billing statements indicate that the time was split between the

City and LMCIT. If these split hours are added, the attorney spent a total of fourteen (14) hours working on an opinion letter and conducting legal research. The amount of time spent working on the opinion letter between May 4-6, 2010 is excessive, unreasonable, and unnecessary. The district court therefore abused its discretion in allowing the time, and this Court should reverse the award of attorney's fees.

The amount of attorney's fees sought by the City in this matter was excessive, unreasonable, and unnecessary. It may be that many of the hours were split between the City and LMCIT for certain work, however, the amounts billed are still excessive, redundant, and unnecessary, and are therefore unreasonable. Hours not reasonably expended by an attorney should be deducted from an award of attorney's fees. Specialized Tours, Inc., 392 N.W.2d at 542. The district court's award of attorney's fees should be reversed or, alternatively, significantly reduced as being unreasonable.

CONCLUSION

Based on all of the foregoing, this Court should reverse the district court's order granting the City's motion for summary judgment, dismissing Marketline's counterclaims with prejudice, and denying Marketline's motion for continuance to conduct further discovery. This Court should also reverse the district court's award of attorney's fees in favor of the City, or alternatively, reduce the amount of attorney's fees awarded by the district court.

Dated this 23rd day of February, 2011.

A large, stylized handwritten signature in black ink, which appears to read "Joseph A. Wetch". The signature is written over the printed name and extends to the right of the printed text.

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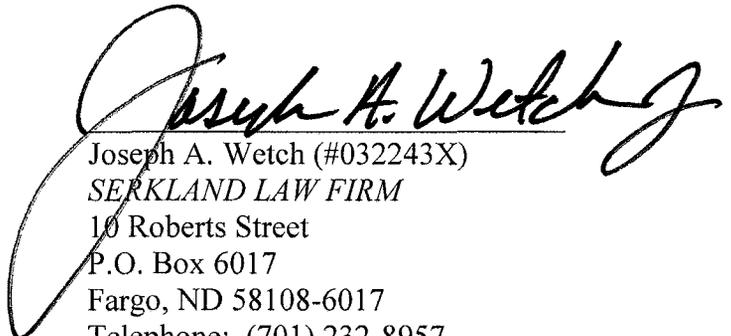
Attorneys for Appellant Marketline

Construction Capital, LLC

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, hereby certifies, in compliance with Rule 132.01, Subd. 3 of the Minnesota Rules of Civil Appellate Procedure, that the above Brief, excluding words in the table of contents, table of citations, any addendum containing statutes, rules, regulations, etc. and any appendix, signature block, Certificate of Service and this Certificate of Compliance, which was prepared in Microsoft Office Word 2007, using Times New Roman font, size 12, totals 9,384 words.

Dated this 23rd day of February, 2011.


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