

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'S REPLY 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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FACTUAL SUMMARY

The facts of this case have been fully set forth by both parties in their principal briefs and will not be recited herein except if appropriate to address certain legal arguments.

ARGUMENT

Respondent City of Maple Grove (“City”) advanced several arguments in response to Appellant Marketline Construction Capital, LLC’s (“Marketline”) principal brief. In accordance with Minn. R. Civ. App. P. 128.02, Subd. 4, this Reply Brief will be confined only to new matters raised in the City’s principal brief.

The City argues that the District Court properly dismissed Marketline’s Counterclaims, the District Court properly denied Marketline’s motion for continuance, that the City is immune from suit by vicarious immunity, and that the District Court’s award of attorney’s fee must be upheld. However, the District Court erred in dismissing the counterclaims and in denying Marketline’s request for a continuance as Marketline was entitled to develop the facts necessary to prove the essential elements of its counterclaims. Further, the District Court failed to address or consider the vicarious immunity issue, and failed to make specific findings of fact on the reasonableness of the attorney’s fees award. Therefore, this Court should reverse the District Court’s grant of summary judgment in favor of the City and dismissing Marketline’s Counterclaims with prejudice.

I. THE DISTRICT COURT ERRED IN DISMISSING MARKETLINE’S COUNTERCLAIMS AND DENYING MARKETLINE A CONTINUANCE TO CONDUCT FURTHER DISCOVERY.

The District Court concluded that “Marketline . . . failed to establish essential elements of each of its . . . counterclaims.” (Add. 5). The City contends that Marketline failed to present any evidence precluding summary judgment dismissal of the counterclaims. However, the District

Court erred in granting summary judgment in favor of the City and dismissing all of Marketline's counterclaims with prejudice.

A. **The Elements of Marketline's Counterclaims are Questions of Fact and Marketline was Improperly Precluded From Conducting Discovery to Develop the Facts Necessary to Prove Its Counterclaims.**

The City correctly cites the elements of fraud as: (1) 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 suffered pecuniary damage as a result of the reliance. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986). Likewise, a claim of promissory estoppel requires proof that the promisor intended to induce reliance. Deli v. Univ. of Minnesota, 578 N.W.2d 779, 781 (Minn. Ct. App. 1998). Also, "[a]n action for unjust enrichment may be founded upon failure of consideration, *fraud*, or mistake" Holman v. CPT Corp., 457 N.W.2d 740, 745 (Minn. Ct. App. 1990) (emphasis added).

All of these claims require proof of knowledge and/or intent. These elements are necessarily questions of fact for the jury to decide and are inappropriate for summary judgment. This is especially so when the party asserting the claims has not been permitted appropriate discovery to develop the facts essential to proving the claims. A court is not permitted to summarily try fact issues in summary judgment proceedings. Whisler, 160 N.W.2d at 154 n.1. Therefore, the District Court erred in granting summary judgment dismissal of Marketline's counterclaims.

B. Marketline Should Have Been Permitted to Conduct Depositions.

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.

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 v. Perl, 320 N.W.2d 407, 412 (Minn. 1982) (citation omitted).

Marketline carries the burden of proving knowledge and/or intent on the part of the persons making the false representations. Marketline should have been permitted to depose certain people to determine whether they had knowledge of the falsity of their representations or intended to induce reliance by Marketline. "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 depositions to develop the facts related to the issues presented in this litigation and essential for Marketline to prove its counterclaims. Therefore, this Court should reverse the District Court's grant of summary judgment.

II. THE CITY'S CLAIM OF VICARIOUS IMMUNITY IS NOT PROPERLY BEFORE THIS COURT.

The City asserts that it is immune from damages even if Marketline can demonstrate fraud on the part of the City. The District Court did not address the City's argument that vicarious liability applies in this case. It is well-settled that issues not decided by the district court will not be considered for the first time on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). "A reviewing court must generally consider only those issues that the record shows were presented *and considered* by the trial court in deciding the matter before it." Id. (citing Thayer v. American Financial Advisers, Inc., 322 N.W.2d 599, 604 (Minn. 1982)) (internal quotations omitted) (emphasis added). Therefore, this Court should not consider the City's argument that vicarious immunity bars an award of monetary damages against the City.

III. THE DISTRICT COURT ERRED IN FAILING TO MAKE SPECIFIC FINDINGS OF FACT ON THE AMOUNT AND REASONABLENESS OF ATTORNEY'S FEE SOUGHT BY THE CITY.

"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.

The City failed to address Marketline's position that the District Court failed to make specific findings of fact on the amount and reasonableness of the attorney's fees awarded. See Respondent Br., p. 25-31. This argument was advanced by Marketline in its principal brief.

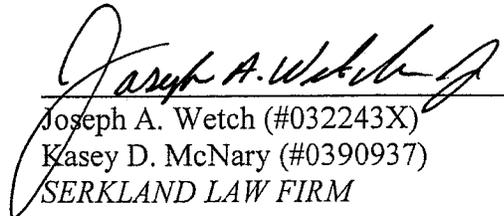
Appellant Br., p. 29-30. Because the District Court failed to make findings of fact on the amount of attorney's fees awarded, and because the District Court did not specifically determine if the amount sought was reasonable, this Court should reverse the District Court's award of attorney's fees.

The District Court failed to even acknowledge that the amount of attorney's fees sought by the City was reasonable. (App. 391). The District Court merely indicated that as the prevailing party the City "is entitled to its reasonable attorney's fees" Id. The District Court then awarded the \$45,459.00 sought by the City without considering any of the factors enumerated in Anderson, or making any findings of fact on the attorney's fees. Therefore, the District Court erred in awarding the City \$45,459.00 in attorney's fees.

CONCLUSION

Based on all of the foregoing, this Court should reverse the District Court's Order granting the City's motion for summary judgment and 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 Order awarding the City its attorney's fees, or alternatively, reduce the amount of attorney's fees awarded by the District Court.

Dated this 8th day of April, 2011.


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