

State of Minnesota
In Court of Appeals

KENNETH AND MARY ELLEN HORODENSKI,
Appellants,

vs.

LYNDALE GREEN TOWNHOME ASSOCIATION, INC.,
Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX
IN SUPPORT OF APPEAL

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

Issue I:

Did the District Court err in Dismissing Appellant's Complaint Seeking a Declaratory Judgment when Appellant's Rights and Obligations under Contract Needed Declaration?

Ruling Below: No. The District Court failed to answer this question and dismissed Appellant's request for a declaratory judgment.

Apposite Authority:

Harrington v. Fairchild, 51 N.W.2d 71 (Minn. 1952).

Minn. Stat. § 555.01 (2010).

Rice Lake Contracting Corp. v. Rust Environment and Infrastructure, Inc., 549 N.W.2d 96 (Minn. App., 1996).

Issue II:

Did the District Court err in Granting Summary Judgment to Respondent Lyndale Green Townhome when Appellants Kenneth and May Ellen Horodenski Provided the Court with Genuine Issues of Material Fact?

Ruling Below: No. The Court dismissed the Appellant's Motion for Summary judgment and granted the Respondent's Motion for Summary Judgment.

Apposite Authority:

Betlach v. Wayzata Condominium, 281 N.W.2d 328 (Minn. 1979).

Minn. R. Civ. P. 56.03

Issue III:

Did the District Court err in Dismissing Appellant's Motion to Compel Discovery?

Ruling Below: No. The District Court ruled that Appellant's Motion to Compel Discovery was Moot.

Apposite Authority:

Hasan v. McDonald's Corp., 377 N.W.2d 472 (Minn. App. 1985).

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

Issue IV:

Did the District Court Err in Dismissing the Appellant's Claim Against Respondent for Breach of Duty of Good Faith when the Association Failed to Contact the Horodenskis for Over One and a Half Years?

Ruling Below: No. The District Court held that the action of pursuing legal advice was not a breach of the Association's duty of good faith.

Apposite Authority:

Sterling Capital Advisors, Inc. v. Herzog, 575 N.W.2d 121 (Minn. App. 1998).

Minn. Stat. § 515B.1-113 (2010).

Statement of Case

This is an appeal from a summary judgment entered in District Court, Hennepin County, Minnesota by the Honorable Marilyn Rosenbaum, District Court Judge. Beginning in 2008, Kenneth and Mary Ellen Horodenski (collectively "the Horodenskis") attempted to contact Lyndale Green Townhome Association (hereinafter "the Association"), their Homeowners Association, asking for various repairs. On October 21, 2009, after numerous failed attempts to obtain any response and on the recommendation from Diane Peterson, an employee of the Association's property management company, Kenneth Horodenski wrote the Association's Board of Directors a letter stating his displeasure with their inadequate communication and requested certain repairs be made to the property. Without notice, the Association's Board of Directors forwarded his letter to their attorney and had the attorney draft a response. For the attorney performing the Association's work, the Association charged the Horodenskis \$2471.00 in attorney fees.

Unfortunately, there is a discrepancy in whether the attorney fees were within the provisions of the Association's governing documents. To clarify this contractual misunderstanding, the Horodenskis were forced to commence an action in District Court seeking a declaratory judgment

regarding the attorney fees. In the same action, Respondents filed a counterclaim seeking relief for a breach of contract. On cross-motions for summary judgment, the District Court held that the plain language of the parties' agreement justified the attorney fees. The District Court granted Respondent's motion for summary judgment and awarded costs and attorney fees in the amount of \$22,527.15. The Horodenskis now appeal the District Courts decision.

Statement of Facts

1. Appellants Kenneth Horodenski (hereinafter "K. Horodenski") and Mary Ellen Horodenski (M. Horodenski") own a property located at 316 W. 84th Street, Bloomington, Hennepin County, Minnesota, legally described as Lot 48, Block 1, Lyndale Green 2nd Addition (CIC No. 1464), according to the recorded plat thereof, and situated in Hennepin County, Minnesota ("the Property"). (Addendum, p. 4).
2. Kenneth Horodenski, Jr. ("K. Horodenski Jr."), their legally blind son of the Horodenskis, occupies the townhome on the Property. (Addendum, p. 40 ; Complaint ¶ 4, 5).
3. Defendant Lyndale Green Townhome Association Inc. (the "Association") is a Common Interest Community located in the City of Bloomington, Hennepin County, and formed under the

Minnesota Common Interest Ownership Act (the "Act") Minnesota Statutes Chapter 515B. (Addendum p. 40).

4. The Association is responsible for the maintenance, upkeep, and management of the group of townhome properties in which the Property is located. (Addendum p. 40).
5. Paradise & Associates, LLC, ("Paradise") professionally manages the Association and is a registered agent of the Association. (Addendum p. 40).
6. The Property is subject to the Common Interest Community No. 1464 Planned Community Lyndale Green Townhomes Declaration ("Declaration") Bylaws, and other rules and regulations (collectively referred to as "Governing Documents"). (Addendum p. 40).
7. The Declaration was made pursuant to the provisions of Minnesota Statute 515B, known as the Minnesota Common Interest Ownership Act (the "Act"). (Addendum p. 40).
8. For over a period of one and a half years the Horodenskis and K. Horodenski, Jr., attempted to address and rectify various repairs, maintenance issues and other concerns with the Association and/or Paradise. (Addendum p. 46).

9. On or about June 29, 2009, Members of the Association met with H. Horodenski Jr. to discuss his concerns with the property and surrounding areas. No answers were provided at that time. (Addendum p. 46; Complaint ¶ 8).
10. After this meeting, through October 21, 2009, the Horodenskis and K. Horodenski, Jr. continued to contact Paradise regarding repairs while hearing no response from Paradise or the Association. (Addendum p. 46, Complaint ¶10.).
11. On or about October 21, 2009 Diane Peterson at Paradise told K. Horodenski that he should write a letter and send it to the Association through Paradise regarding the Associations lack of communication and failure to address the issues with the Property. (Appendix, p. 3)
12. On October 21, 2009, K. Horodenski wrote to the Association, in care of Paradise, a letter stating his dissatisfaction with the response of the Association and listed items needing immediate repair. (Addendum p. 46; Complaint ¶ 14).
13. On October 29, 2009, Paradise delivered a letter indicating that K. Horodenski's letter had been sent to the Board of Directors for the Association. (Appendix, p.11 ; Complaint ¶ 17).

14. Upon receiving the October 21, 2009 letter, the Association consulted with its attorney regarding the Association's rights and obligations on the topic of the Horodenski's concerns within their own Governing Documents. (Addendum p. 46).
15. By letter dated November 16, 2009, the Association's attorney responded directly to the Horodenskis, advising that the responsibility for repairs and maintenance were covered by the Declaration. (Addendum p. 46).
16. The letter dated November 16, 2009 addressed each request separately, describing what repairs were the responsibilities of the Association and the Association's future remedial action. (Addendum p. 46-47; Appendix p.12)
17. The letter dated November 16, 2009 explained that legal fees incurred by the Association may be assessed against the Property, pursuant to the Declaration. The letter never mentioned and never attempted to identify Appellant's Counsel although they knew he was represented by an Attorney. (Addendum p. 47; Appendix p.12)
18. Minnesota Rule of Professional Conduct 4.2 states "In representing a client, a lawyer shall not communicate about the subject of representation with a person the lawyer knows to be represented by

another lawyer in the matter, unless the lawyer has consent.” Minn. R. Prof. Conduct 4.2. Respondent’s Attorney did not have consent to communicate with K. Horodenski. (Addendum p. 47)

19. The relevant portion of the Declaration states:

“Reasonable attorneys’ fees and other costs incurred by the Association in connection with (i) the collection of assessments and (ii) the enforcement of the Governing Documents, the Act, or the Rules and Regulations, against an Owner or Occupant...may be assessed against the Owner and the Owner’s unit.”

(Addendum p. 42; Minnesota Statutes Chapter 515B, § 6.1(d)).

20. On or about December 23, 2009, the Association demanded payment from the Horodenskis for Attorney fees incurred by the Association’s attorneys in determining the Association’s repair responsibilities under their own Declaration and explaining them to the Horodenskis. (Complaint ¶ 21)

21. As Defendants were unwilling to waive or reduce the claim for legal fees, Appellant Horodenskis were forced to file a Complaint dated April 19, 2010 requesting a declaratory judgment pursuant to the Minnesota Uniform Declaratory Judgments Act, Chapter 555 of the Minnesota Revised Statutes and Minnesota Rule of Civil

Procedure 57 and making additional claims of an unconscionable contract clause pursuant to Minn. Stat. § 515B.1-112.; Breach of Duty of Good Faith pursuant to Minn. Stat. § 515B.1-113; and Attorney Fees pursuant to Minn. Stat. § 515B.4-116. (Complaint ¶ 22-44).

Argument

This court is asked to review and reverse in its entirety, the District Court's order dismissing the Horodenski's request for a declaratory judgment and granting summary judgment in favor of Respondent's counterclaims. Every claim and counterclaim in this matter depends on the court's declaration of rights and obligations for each party as they pertain to the November 16, 2009 letter and the Governing Documents.

I. THE DISTRICT ERRED IN DISMISSING APPELLANT'S COMPLAINT SEEKING A DECLARATORY JUDGMENT WHEN APPELLANT'S RIGHTS AND OBLIGATIONS UNDER THE CONTRACT NEEDED DECLARATION.

Minnesota's declaratory judgment statute gives courts the power "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01 (2010). Additionally, any "person interested under a ...written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a ... contract... may have determined any question of construction or validity arising under the instrument ... and obtain a

declaration of rights, status or other legal relations thereunder.” Minn. Stat. § 555.02 (2010). In the context of a declaratory judgment action, the Courts apply a clearly erroneous standard to factual findings, “...but review the trial court’s determination of questions of law de novo.” *Rice Lake Contracting Corp. v. Rust Environment and Infrastructure, Inc.*, 549 N.W.2d 96, 98-99 (Minn. Ct. App. 1996).

Appellants’ seek to correct Respondent’s contract misinterpretation leading to a charge of \$2471.00 in attorney fees. There is no dispute that the Governing Documents constitute a binding contract between the Horodenskis and the Association. The dispute lies in whether the actions of both Appellant and Respondent place Appellants within the Association’s Governing Documents, all of which are governed by the Minnesota Common Interest Ownership Act, Minn. Stat. § 515B.1-101, *et seq.* The relevant part creating this conflict states:

(4) reasonable attorney fees and costs incurred by the association in connection with (i) the collection of assessments and, (ii) the enforcement of this chapter, the articles, bylaws, declaration, or rules and regulations, against a unit owner, may be assessed against the unit owner’s unit

This conflict may be resolved by the District Court or jury’s independent examination of the facts regarding the circumstances surrounding the November 16, 2009 letter. If the Horodenskis are not

entitled to petition the court for a declaratory judgment correcting the charge of attorney fees, Lyndale Green Townhome would be given absolute power to charge attorney fees for any question a homeowner asks the Board of Directors.

The outcome of both Appellants' claims and Respondent's counterclaims on this issue are dependent on the court first clarifying the contract and declaring the parties rights as those rights pertain to the attorney fee clause of the declaration. The other legal claims and counterclaims related to this issue cannot be properly addressed until a court clears up the confusion with the contract interpretation.

A. The Facts Pleaded in the Appellant's Complaint Demonstrate a Justiciable Controversy Needing the Courts Declaratory Judgment.

Under Minnesota law, a justiciable controversy must exist before courts may render a declaratory judgment. *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 587 (Minn. 1977). A declaratory action is justiciable if it (a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts

that would form an advisory opinion. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. App. 2001).

As indicated more thoroughly below, Appellants have asserted a cognizable right pursuant to Minnesota Statute, have interests materially adverse to Respondents and judgment by the Court would finally resolve this matter allowing both parties to understand their rights under the Governing Documents.

a. Appellants, as Homeowners of 316 W. 84th Street, Bloomington, Hennepin County, Minnesota, have a Tangible Interest in Obtaining a Declaratory Judgment Regarding Attorney Fees Assed against their Unit.

A justiciable controversy involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a decree or judgment of a specific character..." *Seiz v. Citizens Pure Ice Co.*, 290 N.W. 802, 804 (1940).

It is uncontested that the Horodenskis have a major tangible interest in obtaining a declaratory judgment. Additionally, Appellants have asked the Court to grant specific relief, more specifically, find that the attorney fee clause of the Minnesota Common Interest Ownership Act is not enforceable in this instance.

The severity and gravity of this court's decision affects the potential ownership of the Horodenski's home. (Addendum, p.36 ¶9) This is a case of first impression in Minnesota. Moreover, without looking at the actual facts of the case, the District Court refused to partake in a declaratory judgment analysis and in haste dismissed Appellants request. Basing the Court's decision strictly on only one invoice showing past due charges, the District Court assumed a breach of contract without looking at the actual facts.

Since June 6, 2006 the Horodenskis have stayed current on all Association dues. Beginning after the unfixed repair issues, the letters between the Horodenskis, Paradise, and the Association's Attorney, and the legal fee assessment against the Horodenskis, the Horodenskis missed their November and December Association rent payments. However, on January 5, 2010 the Horodenskis corrected their late payments and paid \$539.28 to cover the Association Rent for November, December, and January. The Association accepted this payment and the Horodenskis did not pay the \$2,471 legal fee because they believed the November 16, 2010 letter was not covered within the Governing Documents. The following month, the Horodenskis paid \$179.76 on January 27, 2010 for their February Association Rent. Additionally, on February 5, 2010 the

Horodenskis paid \$50 to cover the late charges assessed for missing their November and December Association Rent payments. All of these payments were accepted by the Association. (Appendix, p. 16)

While the Horodenski's continued to pay their Association Rent, the Association continued to cash their checks. In the meantime the Association kept running up the bill in attorney fees to collect the original disputed legal fees. From February through May, the Association accepted and cashed the Horodenski's Association Rent. On or about May 26, 2010, the Horodenskis paid their 179.76 dues for the June 2010 Association Rent. For this first time, Lyndale Green refused to accept the check and sent it back through the Horodenski's attorney. The July and August payments were timely paid and Lyndale Green continued to refuse the payment. In addition to adding extra attorney fees, Lyndale Green refused to mitigate their perceived damages by not accepting the Association Rent each month. The Horodenskis continue sending their Association Rent payments and they continue to be refused and returned. (Appendix p. 2-5, 16).

As a result of the court not acknowledging these facts, the Court ordered the Sherriff of Hennepin County to sell the Property in a manner provided by law to pay the outstanding judgment. (Addendum, p.36 ¶9)

The Horodenskis have a major interest in not losing their home and displacing their blind child.

b. The Horodenskis and Lyndale Green Townhome have Adverse Interests Regarding the Outcome and Interpretation of the Governing Documents

Respondent maintains that their attorney's November 16, 2009 letter was an enforcement of the Association's Governing Documents. "Among the essentials necessary to the raising of a justiciable controversy is the existence of a genuine conflict in the tangible interests of the opposing litigants." *Arens v. Village of Rogers*, 61 N.W.2d 508, 513 (Minn. 1953).

Appellants and Respondents directly dispute the immediate and actual question of whether Respondent's attorney letter dated November 16, 2009 is "an enforcement" against a unit owner. In a declaratory judgment action, the controversy requirement of justiciability "...is viewed leniently and satisfied if there is a controversy of 'sufficient immediacy and reality' to warrant issuance of a judgment." *Rice Lake Contracting Corp. v. Rust Environment and Infrastructure, Inc.*, 549 N.W.2d 96, 99 (Minn. App., 1996). The facts in this case show adverse interest that are indeed real and need an immediate judgment.

On recommendation from Diane Peterson at Paradise, Mr. Horodenski wrote a letter to the Board of Directors stating his

dissatisfaction with the response of the Association and listed items needing immediate repair. (Appendix, p. 3) If anything, Mr. Horodenski was attempting to enforce the Governing Documents against Lyndale Green Townhome.

After a letter dated October 29, 2009 was received by the Horodenskis stating his letter would be sent to the Board of Directors, the Association consulted their attorney to clarify their maintenance responsibilities to the Horodenski unit. In a letter dated November 16, 2009, the Association's attorney wrote a letter containing the Association's repair responsibilities and proposed different remedial measures. Additionally, the letter "advised" the Horodenskis about their own obligations under the Governing Documents. However, within the letter never once did the letter discuss enforcing any Governing Documents against the Horodenskis. On the contrary, while discussing the accusations of verbal threats and harassments toward the Horodenski's blind son, the letter discussed concerns about any behavior by owners or residents of the Association that may violate the rules of the Association and was willing to enforce its governing documents against those people.

On a letter dated December 23, 2009, the Lyndale Green Board of Directors finally responded to K. Horodenski's October 21, 2009 letter. In

this letter the Board stated that Legal Counsel was sought to answer the issues noted in K. Horodenski's letter. The reason the Board stated they sought out the assistance of legal counsel was so the Horodenski's would better understand the homeowner's responsibility and the Association's responsibility. The Association believes that sending a letter to "better understand the homeowner's responsibility and the Associations responsibility" is an enforcement of the Association's Governing Documents. However, when examining the Association's legal bills, they refer to the November 16, 2009 letter as an, "Opinion Letter" and not enforcement or collections letter. Because of the Appellants and Respondent's conflicting viewpoints along with real facts contradicting Respondent's claims, there is a genuine conflict of tangible interests.

c. A Declaratory Judgment will settle the Dispute.

A declaratory action is a justiciable controversy if it is capable of a specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion. *Cincinnati Ins. Co.*, 621 N.W. 2d at 273. A justiciable controversy "must admit of specific relief by a decree or judgment of a specific character..." *Seiz v. Citizens Pure Ice Co.*, 290 N.W. 802, 804 (Minn. 1940).

Appellants respectfully request in their action for declaratory relief that the District Court adjudicate Appellant's rights and obligations under the governing documents as they pertain to the attorney fees and the November 16, 2009 letter. Appellants are not asking for an advisory opinion. Appellants have presented an abundance of facts that it seeks to establish in this case to support Appellant's conclusion that the November 16, 2009 letter was not made "to enforce against an Owner" the Association's Governing Documents.

The attachment of attorney fees has started Appellants down a very slippery slope. As a result of asking their homeowners association and Board of Directors for assistance in repairing property covered by the Governing Documents, the Horodenskis are in the brink of losing their home and paying \$22,527.15 in attorney fees. Allowing the court to properly run a declaratory judgment analysis will enable a result more towards the interest of justice. Finding that a reasonable person would not believe that asking their homeowner managing company to repair the common areas of the community would be an enforcement of the Governing Documents needing thousands of dollars in attorney fees would allow the Appellants to keep their home, give the Horodenski's son a place to live, and keep a paying homeowner within the Association.

B. The Appellants should be allowed to have a Court Declare their Contractual Rights and Determine the Question of Validity under the Contract Removing any Uncertainty and Insecurity.

We ask the court to mimic the reasoning set forth in *Harrington v. Fairchild*, 51 N.W. 2d 71 (Minn. 1952). In *Harrington*, plaintiff requested for a declaration of a present existing relationship between two parties, by reason of contract, and for a declaration of the duties and obligations of the defendant, both now and in the future. *Id.* at 74 The court held that “In the instant case, the allegations are that defendant stated that he will make no more payments, pursuant to the contract or otherwise; that he has made no payments since February 1949, and that he has informed plaintiff that the contract is not a valid and subsisting contract. Those pleaded facts definitely indicate that there is an actual controversy between the parties. There is a real issue between them. The actual controversy is not one that will arise in the future upon the happening of a certain contingency, but is a controversy over a present right. Plaintiff is interested in establishing the contract as a good and valid subsisting contract. The court has the power to declare such right, and, under the statutes, plaintiff, as interested party, may have determined the question of validity arising under the contract and ask for a judgment or decree which will remove the uncertainty and insecurity.” *Id.*

In this case, the facts are very similar to *Harrington*. Like *Harrington*, the Appellants requested for a declaration of a present existing relationship between themselves and the Respondents, by reason of contract, and for a declaration of the duties and obligations under the agreement. The Appellants stated that they would not pay attorney fees for the “opinion letter” and informed the Respondents that the clause in the contract is not valid to the underlying facts of this case. Like in *Harrington*, these pleaded facts definitely indicate that there is an actual controversy between the parties. Here, Appellants are interested in establishing that the work performed by Respondent’s attorney is not an “enforcement of the contract.”

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGEMENT TO RESPONDENT LYNDAL GREEN TOWNHOME WHEN APPELLANTS KENNETH AND MAY HORODENSKI PROVIDED THE COURT WITH GENUINE ISSUES OF MATERIAL FACT.

Summary judgment is appropriate when there are no genuine issues of material fact and either party is entitled to judgments as a matter of law. Minn. R. Civ. P. 56.03; *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn. 1979). On review, the Court of Appeals must view the evidence in the light most favorable to the party against whom the motion for summary judgment was granted. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242

(Minn. 1982). On appeal from summary judgment, the court of appeals must "...ask two questions; (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State by Cooper v. French*, 460 N.W. 2d. 2, 4 (Minn. 1990).

The Court of Appeals does not give deference to the district court's conclusions of law and reviews questions of law de novo. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.E.2d 303, 311 (Minn. 2003) (citing *Kornberg v. Kornber*, 542 N.W.2d 379, 384 (Minn. 1996)).

The basic rules and standards of granting summary judgment have been decided and or not in question. A court may not find facts where there is a dispute, and evidence, including inferences therefrom, must be viewed in favor of the non-moving party. A Jury must determine those facts. In this case, the District Court seriously deviated from those standards.

The District Court found that the Horodenskis breached their contract to the Association by failing to pay their assessments and late charges as they became due. This finding is directly contradicted by Respondent's invoice showing payment of the assessments and late charges. This finding is also directly contradicted by evidence contained in Kenneth Horodenski's affidavit swearing under oath he made his assessment

payments each month and beginning in June 2010, were refused by the Association. (Appendix, p. 16) Furthermore this finding is contradicted by the fact Appellant has copies of every check sent to the Association with the return letter.

The District Court also based its summary judgment on finding that attorney fees were incurred "in connection with" the collection of assessments or enforcement of Governing Documents. The conclusion appears to stem from the Courts erroneous exclusion of the "against the Unit Owner" provision in section 6.1(d) of the Governing Documents. The evidence submitted to the court demonstrates that the November 16, 2009 letter had nothing to do with collecting fees. In email dated Friday, January 22, 2010, two (2) months after the November 16, 2009 letter, Respondent's Attorney Phaedra J. Howard states to Appellant's counsel, "Our office has not been asked to initiate any collection action against your client, nor is likely that we would be engaged to do so unless he becomes more than 60 or 90 days delinquent." As the evidence shows, Appellants paid their entire past due Association assessments along with the late fees. It was only after Respondents stopped accepting the assessments a "delinquency" occurred.

On summary judgment, the non-moving party is entitled that all inferences be made in its favor, and on appeal, the evidence must be viewed in the light most favorable to the non-moving party. *Grondahl*, 318 N.W.2d at 242. In this case, in the context of summary judgment, Appellants were entitled to an inference that a reasonable person would not characterize a letter advising a homeowner of the obligations and remedial measures taken by their homeowners association as an enforcement and attorney fees were unrelated to the enforcement of Governing Documents against a unit owner.

Appellants Kenneth and Mary Ellen Horodenski are entitled to a trial on the merits, since genuine issues of material fact exist with respect to the timeline of events leading to the request for a Declaration and the letter dated November 16, 2009.

III. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S MOTION TO COMPEL DISCOVERY

In District Court, Appellants sought an order to compel discovery to determine the body of information considered by the Association in charging the fees and whether additional material information was omitted from previous discovery disclosures.

The court reviews a decision on a motion to compel discovery under the same test set out in *Rice v. Perl*, 320 N.W. 2d 407, 412 (Minn. 1982), for

discovery continuances. *Hasan v. McDonald's Corp.*, 377 N.W.2d 472, 475 (Minn. App. 1985). *Rice* established two inquiries, (1) whether the plaintiff has been diligent in obtaining or seeking discovery and (2) whether the plaintiff is seeking further discovery in the good faith belief that material facts will be uncovered or if the exercise is merely a "fishing expedition." *Id.* at 412. Additionally, there is a presumption in favor of granting continuances to allow sufficient time for discovery. *Id.*

Notwithstanding the fact that both the Appellants and Respondents stated facts are measurably different, many questions have been left open during the pre-litigation attorney communication. Under the *Rice* test, Appellants have fulfilled the requirements for a court to compel discovery in this case.

A. Appellant Diligently Requested Discovery Consistently Throughout the Litigation Process.

As early as January 6, 2010, Appellants have been seeking discovery documents to this matter. From the very beginning of litigation, requests for documentation, interrogatories, and other discovery requests have been made by both sides. There has been an open dialogue between opposing counsel although Respondents refuse to release necessary discovery.

B. Appellant is Seeking Further Discovery in a Good Faith Belief that Material Facts Regarding the Circumstances of the November 16, 2009 Letter will be Uncovered.

Appellants have a good faith belief and actual knowledge that material facts will be uncovered with additional discovery.

In communications with opposing counsel, Respondent's attorney discussed the possibility of previous letters discussing Appellant's request for property repairs. The discovery of these letters could either strengthen or weaken each party's side.

The Board of Director's handling of the Horodenki's numerous complaints is at issue in this case. In addition to interrogatories needed from Board Members, the release of the Board minutes and notes is imperative to unraveling the intent of the Board. It is reasonable to believe that K. Horodenski's letter and the proper handling of it was discussed at the meetings. It would be important to find out if the Board of Supervisors did their due diligence and acted in good faith in meeting their obligations as a representative of the Association by attempting to appease their homeowner without the need of outside help. It is also important to understand the level of knowledge the Board has in knowing their own obligations under their own contract. Ultimately, this information will shed light on the main question of whether the Board was using an

attorney to enforce any Governing Document against the Horodenskis or whether the actions by the Association to assess Attorney fees against Horodenski were conducted in bad faith.

Finally, we have reason to believe that it was a member of Paradise who requested K. Horodenski to write the letter in the first place. Based on Kenneth Horodenski's Affidavit submitted to the court, Diane Peterson at Paradise told K. Horodenski that he should write a letter and send it to the Association through Paradise regarding the Associations lack of communication and failure to address the issues with his Property. (Appendix, p. 3) Knowing Ms. Peterson's involvement and the disclosures related to Peterson and Paradise & Associates is vital in determining the circumstances surrounding K. Horodenski's initial letter.

C. The *Rice* test that Applies to Appellant's Motion to Compel Discovery should have been reviewed before the District Court's Dismissal.

This case mirrors many of the same facts presented in *Hasan v. McDonald's Corp.*, 377 N.W.2d 472 (Minn. App. 1985). In *Hasan*, Respondents moved for summary judgment. Appellant then moved to compel discovery. Much discovery had already taken place. The trial court granted respondents' summary judgment motion and declared the motion to compel discovery moot. *Id.* at 473. The court held that the *Rice* test

applies to the Appellant's motion to compel discovery before the motion for summary judgment should be considered. The better practice would have been for the trial court to apply the *Rice* test in ruling on the Appellant's motion. *Id.* at 475.

The same result has occurred in this matter. The District Court dismissed the motion to compel discovery as moot without considering the precedent set forth in *Rice*. There are many potential discoverable material facts in this case, as identified herein. The better practice would be for the trial court to apply the *Rice* test and then rule on the Appellant's motion to compel discovery.

IV. THE ASSOCIATION BREACHED THEIR DUTY OF GOOD FAITH WHEN THEY FAILED TO CONTACT THE HORODENSKIS AND REMEDY THE REPAIRS REQUIRED UNDER THE GOVERNING DOCUMENTS.

Bad Faith in a legal context is defined as the continuous and willful failure to fulfill one's duties or obligation. "Bad Faith". YourDictionary.com. 2011. <http://law.yourdictionary.com/bad-faith>. (15, Mar. 2011). Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not "unjustifiably hinder" the other party's performance of the contract. *Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984). To establish a violation of the covenant of good faith and fair dealing a party must

establish bad faith by demonstrating that the adverse party has an ulterior motive for its refusal to perform a contractual duty. *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998).

As an agent of the Lyndale Green Townhome Association, Paradise & Associates is under the same contractual duties as their Principal. Paradise & Associates and Lyndale Green Townhome Association are under a contract that expressly includes a duty of good faith and fair dealing. Within this duty, both companies are obligated to communicate in an effective and timely manner. Respondents concede that for over a year and a half, K. Horodenski attempted to correct repair issues in the community.

As demonstrated by the November 16, 2009, some repair issues were the contractual obligation of the Association. Under either definition, the Association acted in bad faith. A year and a half of limited to no communication along with unfixed repair issues is a continuous failure to fulfill the Association's duties and obligations. A year and a half of limited or no communication unjustifiably hinders the Horodenski's in performing their end of the contract. Like many of the claims above the District Court refused to go through a proper analysis and even acknowledge the facts described above. The District Court started at the statement that the Horodenski's October 21, 2009 resulted in the Association seeking legal

assistance. What they did not recognize was it took over a year and a half and a failed pursuit of a solution for the Horodenskis to send that letter.

What the court also failed to recognize was the fact that a question of fact regarding an ulterior motive was present. From the complaint through the letters sent by the Horodenskis and Association, the question of whether the Association or its Agents were harassing the Horodenski's son because he is blind is in controversy. (Appendix p. 2, 14) There are facts that must be established in trial pertaining to this ulterior motive. The Appellant's claim that the Association desires that K. Horodenski Jr. leave the property because he is blind. K. Horodenski Jr. has been told that he should be in a home for blind people. Appellants need more discovery and should have the opportunity to bring this claim to a trier of fact.

This court must find that this failure to fulfill the Associations duties and their ulterior motive is the essence of acting in bad faith.

Conclusion

The Horodenskis' asking for repairs to their unit led to their homeowners association charging \$2471.00 in attorney fees. As set forth above, the Appellants have met every requirement required for a courts declaratory judgment regarding the \$2471.00. There are numerous factual disputes and the Appellants have alleged valid legal claims. The District

Court ignored the evidence in the record contrary to its conclusions and refused to perform the proper analysis for each legal claim. Appellants Kenneth and May Ellen Horodenski respectfully request that the order for summary judgment be reversed and the case remanded for trial.

Dated: 3-17-12

Respectfully submitted,



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STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

Kenneth and May Ellen Horodenski,

CERTIFICATION OF BRIEF LENGTH

vs.

Lyndale Green Townhome Association, Inc.

CASE NUMBER: A11-289

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 6,299 words. This brief was prepared using Microsoft Word 2003.

Dated: 3/17/2011



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