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NO. A11-329

State of Minnesota
In Court of Appeals

Robert G. Dimke and Mary L. Dimke,

Appellants,

vs.

Naomi Farr, Darrel Farr, and Jon Muir,

Respondents.

REPLY BRIEF OF APPELLANTS ROBERT G. DIMKE AND MARY L. DIMKE

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I. ARGUMENT

Both the Farrs and Muir ignore the central issue raised by the Dimkes' appeal—whether the Farrs even had the right to invoke the summary cancellation procedure under Minn. Stat. § 559.217, subd. 4. To properly invoke section 559.217, subd. 4, the Farrs were required to allege a valid unfulfilled condition that, "by the terms of the purchase agreement cancels the purchase agreement." In response to this issue, the Farrs make two arguments: (1) because the Dimkes failed to obtain an injunction halting the 15-day cancellation period, the trial court's failure to analyze whether the Farrs had alleged a valid unfulfilled condition in their Notice of Cancellation was justified, and (2) the Farrs did allege a valid, unfulfilled condition. The Farrs' first argument fails because Minn. Stat. § 559.217, subd. 4 unambiguously imposes a threshold requirement that a statutory declaratory cancellation involves an unfulfilled condition that by its terms cancels the residential purchase agreement at issue. A party cannot merely serve what they deem to be a notice of declaratory cancellation. Minnesota law has established that a notice of cancellation served prior to an actual default, which can be analogized to an unfulfilled condition under Minn. Stat. § 559.217, subd. 4, is ineffective. The trial court's failure to analyze whether the Farrs had met the requirements of Minn. Stat. § 559.217, subd. 4 because the 15-day cancellation period had run was contrary to law.

The Farrs' second argument also fails as a result of the trial court's failure to determine whether the Farrs had alleged a valid unfulfilled condition. This required the trial court to determine whether the Farrs had used their "best efforts" to obtain marketable title by the date of closing. Because no discovery has been taken, the Dimkes

have had no opportunity to develop the record on this issue. Regardless, because the trial court made no findings regarding the validity of the Farrs' alleged unfulfilled condition, this matter must be reversed and remanded to the trial court.

The Dimkes' second issue on appeal is whether the trial court erred in determining it did not have the ability to consider the Dimkes' equitable arguments and was bound by the legislatively provided remedy, even though "harsh in the view of the [trial court]." In response, the Farrs do not dispute that Minnesota courts have the ability, in the appropriate circumstance, to consider equity. Instead, the Farrs allege that the Dimkes do not deserve equitable intervention. The Farrs' arguments should be rejected based on the undisputed facts. The Dimkes are innocent, good faith purchasers who sought only to close on a valid Purchase Agreement. The Farrs were fully aware that the Dimkes believed that express terms of the Dimke Purchase Agreement obligated the Farrs to cancel the Muir Purchase Agreement. The undisputed facts demonstrate the Farrs' failure to act in good faith and, at a minimum, require remand of this matter to the trial court for consideration of whether the Dimkes are entitled to equitable intervention.

The Dimkes' third issue on appeal is whether this Court should reinstate the Dimkes' claims against Muir if this court determines that the Dimkes' Purchase Agreement survived the Farrs' invalid declaratory cancellation. In response, Muir argues that even if the Dimke Purchase Agreement had not been canceled, Muir is entitled to summary judgment on the Dimkes' claim against Muir for tortious interference with contract. The trial court made no findings regarding the elements of the Dimkes' tortious interference claim against Muir and relied solely on the cancellation of the Dimkes'

Purchase Agreement. Because the Dimkes have had no opportunity to develop the record on this issue, the trial court's decision should be reversed and remanded.

A. The Trial Court Erred By Failing to Analyze Whether the Farrs' Notice of Cancellation was Valid Under Minn. Stat. § 559.217, subd. 4.

Both the Farrs and Muir ask this Court to ignore the unambiguous language of Minn. Stat. § 559.217, subd. 4 which requires the presence of an "unfulfilled condition...which by the terms of the purchase agreement cancels the purchase agreement" before any declaratory cancellation. Minn. Stat. § 559.217, subd. 4 is triggered, by its plain language, in an "if, then" manner: If, there is an unfulfilled condition which by its terms cancels the applicable purchase agreement, then, a party may confirm that cancellation by serving a statutory notice.

The trial court's failure to analyze the Farrs' Notice of Cancellation is further undermined by the language of Minn. Stat. § 559.217, subd. 7. Under this section, an affidavit of cancellation prepared after the 15-day cancellation period that is attached to the notice of cancellation is "prima facie" evidence of the facts stated. Under Minnesota law, "prima facie evidence" is evidence that prevails in the absence of evidence invalidating it. Tousignant v. St. Louis County, 615 N.W.2d 53, 60 (Minn. 2000). This language is unnecessary if courts are powerless to evaluate the contents of a notice of cancellation after 15 days.

There are no reported cases discussing Minn. Stat. § 559.217. But two unreported cases, Mayrand v. Rodacker, No. A08-1599, 2009 WL 2852181 (Minn. Ct. App. Sept. 8, 2009), and Dahlstrom v. Robbinson, No. A07-1740, 2008 WL 3289838 (Minn. Ct. App.

August 12, 2008), do illustrate an important point in response to the Farrs' position. Both of these cases show a trial court evaluating the merits of a declaratory cancellation under Minn. Stat. § 559.217 after of the passage 15-day cancellation period without a request for injunctive relief suspending the cancellation. In Mayrand, the trial court tried the issue of whether the agreement at issue was properly canceled. 2008 WL 2852182, *2.

The Farrs argue that the trial court implicitly evaluated whether they had alleged a valid unfulfilled condition by finding that the Dimke Purchase Agreement was canceled. But the trial court's order makes clear that the sole basis for its decision is that the Dimkes failed to obtain a court order suspending the cancellation. The trial court's decision is inconsistent with those Minnesota cases holding that a notice of cancellation of an agreement served prior to an actual default is ineffective. See Mattson v. Greifendorf, 183 Minn. 580, 237 N.W. 588 (1931); Vieths v. Thorp Fin. Co., 305 Minn. 522, 524, 232 N.W.2d 776, 778 (1975). Here, Minn. Stat. § 559.217, subd. 4 required the trial court to analyze the Dimke Purchase Agreement to determine whether the Farrs' Notice of Cancellation was supported by a valid unfulfilled condition in the Purchase Agreement.

In an attempt to distinguish this line of cases, the Farrs attempt to identify a "critical distinction" between a declaratory cancellation of a residential purchase agreement under Minn. Stat. § 559.217, subd. 4, and a cancellation of a contract for deed under Minn. Stat. § 559.21. Specifically, the Farrs claim there is only one way to stop a declaratory cancellation but there are two ways to stop a cancellation of a contract for deed. The Farrs' argument simply misses the point. Regardless of the number of ways to

stop a cancellation under Minn. Stat. § 559.21, Minnesota courts hold that the event triggering a cancellation—an actual default—is required for an effective notice of cancellation. See, e.g., Mattson, 183 Minn. at 584, 237 N.W. at 589 (holding that, "there was no real default at the time the notice of cancellation was served and no justification for the attempted cancellation"). Similarly, the triggering event for a declaratory cancellation—an unfulfilled condition that by its terms cancels the purchase agreement—is required for an effective declaratory cancellation.

Because the trial court did nothing but confirm that the Dimkes had not obtained an injunction within the 15-day cancellation period, it did not properly evaluate whether the Farrs had met the threshold requirements of Minn. Stat. § 559.217, subd. 4. Nonetheless, the Farrs claim that they were unable to provide marketable title on the date of closing, and thus the unfulfilled condition was the Dimkes' failure to voluntarily sign a non-statutory cancellation drafted by the Farrs. (Farrs' Response at p. 32.) The Farrs use of the phrase "on the date of closing" misrepresents the language of the Dimke Purchase Agreement. In fact, the Dimke Purchase Agreement required that the Farrs provide marketable title "by the day of closing." (D. App. 296.) The only thing the Farrs had to do between signing the Dimke Purchase Agreement (on or about August 8, 2010) and the closing on the Dimke Purchase Agreement (scheduled for September 10, 2010) was to cancel the Muir Purchase Agreement. They chose not to cancel the Muir Purchase Agreement based on advice of counsel (D. App. 360) and because they wanted to maintain a damage claim against Muir. (D. App. 365-66.) By simply choosing not to formally cancel the Muir Purchase Agreement, the Farrs violated their obligation under

the Dimke Purchase Agreement to use their "best efforts" to obtain marketable title by the date of closing. The Farrs are not entitled to re-write the Purchase Agreement to alter their obligations.

The Farrs' claim that they could not provide marketable title should also be rejected given the terms of the Muir Purchase Agreement. The Muir Purchase Agreement was canceled according to its terms if Muir was unable to obtain the necessary financing and the Muir Purchase Agreement did not close by June 11, 2010. (D. App. 205.) It is undisputed that as of June 11, 2010, Muir had not obtained financing and the Muir Purchase Agreement had not closed. Simply because Muir coincidentally reappeared the day before the Dimkes were scheduled to close on Dimke Purchase Agreement does not mean the Farrs could not obtain marketable title "by the date of closing."

B. The Trial Court Erred By Failing to Consider Its Equitable Jurisdiction to Halt the Farrs' Declaratory Cancellation.

The Farrs implicitly acknowledge that Minnesota law allows a trial court to consider equity in evaluating statutory cancellations. However, the Farrs' opposition to the trial court's use of its equitable powers is incorrect, at best, and disingenuous, at worst. First, the Farrs incorrectly assert that the standard of review that this Court should adopt is "clearly erroneous." Contrary to the Farrs' suggestion, the trial court did not make findings regarding the Dimkes' entitlement to injunctive relief. The trial court interpreted the effect Minn. Stat. § 559.217, subd. 4, had on the Dimkes' entitlement to equitable relief, including injunctive relief. The trial court's belief that it could not

consider the equities because of its inelastic application of the 15-day cancellation period in Minn. Stat. § 559.217, should be reviewed as a matter of law. Weston v. McWilliams & Assoc., Inc., 716 N.W.2d 634, 638 (Minn. 2006).

Moreover, the Farrs' claim that they are the wronged party should be summarily rejected. The Dimkes entered into a Purchase Agreement for the Property at the price for which the Farrs listed it for sale. And the Dimkes still seek to purchase the Property at the Farrs' asking price. Thus, the Dimkes are not seeking to avoid any legal obligations. They are merely seeking to enforce a valid Purchase Agreement. This litigation could have been avoided entirely if the Farrs had put their contractual obligations to the Dimkes ahead of their admitted desire to obtain damages in their unfiled lawsuit against Muir. (D. App. 365-366.)

Second, the Farrs cannot feign surprise and argue that it was not until November 22, 2010 (the date they received the Dimkes' motion for summary judgment), that they understood why the Dimkes were objecting to the Farrs' Notice of Cancellation. Not only did the Dimkes refuse to voluntarily cancel the Purchase Agreement because they did not believe the Farrs had a right to cancel the Purchase Agreement, the Dimkes also served the Farrs with their complaint well before the close of the 15-day cancellation period. The Dimkes' Complaint specifically alleged that the Farrs had breached the Dimke Purchase Agreement, "by their actions, including but not limited to, their wrongful cancellation of the [Dimke Purchase Agreement] and their refusal to close on the purchase of the Main House Property by the Dimkes." (D. App. 003). Accordingly,

the Dimkes promptly acted to secure their rights, and the Farrs' contention that the Complaint makes no mention of a challenge to the Farrs' actions is untrue.

In addition to blaming the Dimkes, the Farrs also seek to blame their own real estate agent, Jim Christensen. The Dimkes acknowledge that Christensen eventually became a dual agent for the sale of the Property to the Dimkes. The Farrs allege that Christensen was aware of the unfiled Muir lawsuit and the Farrs' desire to sell the Main House Property only if a sale would not jeopardize their unfiled Muir lawsuit. Because of Christensen's dual agent status, the Farrs incorrectly claim that this knowledge is imputed to the Dimkes. The Farrs' claim highlights their own failure to make these disclosures to the Dimkes. The Dimkes were never informed by anyone of the unfiled Muir lawsuit—which was presumably not filed because the Farrs knew no title company would close on a property associated with a pending lawsuit affecting the title to the property. (D. App. 240-241.) The Dimkes were also never informed by the Farrs that their motivation for selling the property was second to their desire to preserve their damages claim against Muir. (D. App. 365-366.)

The authority cited by the Farrs for the proposition that Christensen's knowledge is imputed to the Dimkes does not apply because it does not involve a dual agency situation. See Rognrud v. Zubert, 282 Minn. 430, 165 N.W.2d 244 (1969) (allowing knowledge to be imputed to principal where agency relationship was exclusive as between the principal and agent). As a dual agent, Christensen's role in the sale was governed by Minn. Stat. § 82.67 which expressly provides that dual agency, "limits the level of representation the broker and salespersons can provide, and prohibits them from

acting exclusively for either party." Minn. Stat. § 82.67, subd. 3. This statute limits Christensen's ability to disclose information, and specifically his ability to disclose confidential information about price, terms, and motivation for pursuing a transaction, which were required to be kept confidential unless the Farrs instructed Christensen in writing to disclose the specifics of the information. See id.

The Farrs certainly now claim one of the motivations of their sale to the Dimkes was to mitigate their damages in the Muir lawsuit. But there is no evidence the Farrs instructed Christensen in writing to provide this or any information regarding the lawsuit to the Dimkes. Instead, the evidence shows that in response to a request from Christensen's office that the Farrs provide an, "update as to the status of the previous buyer's cancellation of purchase agreement—or provide us something in writing that we don't need that anymore" the Farrs' representative indicated, "I will be forwarding you a copy of the previous buyer's answer in the lawsuit where they state there is not a valid purchase agreement. According to our attorney, this should be all that is needed in this regard." (D. App. 360.) Thus, two facts appear undeniable: (1) Christensen, like the Dimkes, was under the impression that the Farrs were required to obtain a cancellation of Muir's Purchase Agreement, and (2) the Farrs obtained legal advice, after entering into the Dimke Purchase Agreement, that they need not cancel the Muir Purchase Agreement. The Dimkes were not privy to these discussions, or aware that the Farrs had determined that the acceptance of Muir's cancellation was no longer needed. Thus, the Farrs' suggestion that Christensen's failure to disclose certain information prevents the Dimkes from seeking equitable relief is without merit.

The Farrs also allege that the Dimkes have acted in bad faith because they have not posted a bond to protect the Farrs either at the trial court level or before pursuing their appeal. This argument merits no real consideration. First, the Dimkes still seek to purchase the Property for the price agreed to in their Purchase Agreement, which was also the listing price. They are not attempting to avoid any legal obligations. The Farrs sold the Property to two parties, and the results can only be attributed to their actions.

Second, as the trial court recognized in its May 3, 2011 Order denying the Farrs' and Muir's motions for an order requiring the Dimkes to post security, the Dimkes did not seek a stay of the trial court's dismissal of their Complaint or discharge of their lis pendens. Absent such a stay, Minnesota law does not require the Dimkes to post security. Ironically, the Farrs now argue that the Dimkes' appeal is preventing them from closing on their sale to Muir and that this somehow evidences bad faith on the Dimkes' part even though the Farrs have argued throughout this matter that the unfiled Muir lawsuit was not an impediment to the Dimkes' closing on their Purchase Agreement.

C. If the Trial Court Erred in Upholding the Farrs' Declaratory Cancellation, the Dimkes' Claims Against Muir Must Be Reinstated.

The trial court dismissed the Dimkes' claims against Muir solely because of its determination that the Dimke Purchase Agreement was void. Muir contends that this Court may independently review the limited factual findings by the trial court and grant summary judgment in Muir's favor even if the Dimke Purchase Agreement is not voided. But the first argument Muir makes in favor of this position is that the Dimke Purchase Agreement was canceled pursuant to Minn. Stat. § 559.217, subd. 4 and, therefore, the

"Farr/Dimke Purchase Agreement is a nullity which Muir could not have interfered with." This argument does not prevent the Court from reinstating the Dimkes' claims against Muir if it reverses the trial court's order dismissing the Dimkes' Complaint.

Muir's remaining arguments are factual allegations based on Muir's own self-serving affidavits which the trial court did not address in making its decision. Before the trial court, the Dimkes disputed Muir's statement that he knew his Purchase Agreements continued to be viable. In fact, this is in direct contrast to the position he took in the lawsuit filed against him by the Farrs and the terms of his Purchase Agreements. (D. App. 205, 375.) Based on Muir's Answer to the Farrs' lawsuit, Muir believed the Muir Purchase Agreements had been canceled by his inability to obtain financing and the Farrs' refusal to allow him to inspect the property. (D. App. 375.)

As noted by Muir, a claim for tortious interference with contractual relations requires findings regarding Muir's knowledge and his justification. The trial court made no findings on these two key elements and Muir's self-serving affidavits regarding these two elements are vigorously disputed by the Dimkes. Where key facts are incomplete, complex and disputed and where the trial court has not made clear findings regarding the same, this Court does not step into the role of the trial court to make factual findings.

II. CONCLUSION

The trial court erred when it failed to analyze whether the Farrs' Notice of Cancellation met the requirements set forth in Minn. Stat. § 559.217, subd. 4, before it determined that the Dimkes' Purchase Agreement had been canceled. The trial court further erred by failing to consider its equitable jurisdiction to halt the Farrs' declaratory

cancellation. This Court should reverse the trial court's grant of summary judgment to the Farrs and Muir and require the trial court to undertake the analysis required under Minn. Stat. § 559.217, subd. 4 and of the Dimkes' entitlement to an equitable injunction. If this Court reverses the trial court's judgment validating the Farrs' declaratory cancellation, the Court should also reinstate the Dimkes' claims against Muir.

Respectfully submitted,

Dated: May 23, 2011

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