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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1314**

Orrin W. Mortensen, et al.,
Appellants,

vs.

Mark G. Swanson,
Respondent.

**Filed March 11, 2013
Affirmed
Rodenberg, Judge**

Rice County District Court
File No. 66-CV-11-2598

Kenneth R. White, Law Office of Kenneth R. White, PC, Mankato, Minnesota (for appellants)

Jacqueline A. Dorsey, Mary L. Hahn, Hvistendahl, Moersch, Dorsey & Hahn, P.A., Northfield, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal from the district court's award of summary judgment in a real estate purchase dispute, appellant-buyers argue that the district court abused its discretion by

considering an issue not addressed by respondent-seller until his reply memorandum and by considering an affidavit attached to that reply memorandum. We affirm.

FACTS

Appellants Orrin and Lori Mortensen purchased a home in Faribault from respondent Mark Swanson via contract for deed on September 30, 2009. The contract called for appellants to make 12 monthly payments, the last being a balloon payment. Respondent had inherited the property and had never lived in it. Appellants paid off the contract for deed and the property was apparently then deeded to appellants.

Appellants sued in 2011, alleging that, “sometime after closing” on the property, they discovered substantial rot in a loadbearing wall. They alleged that respondent had knowledge of the rot at the time of sale but failed to disclose it. Appellants sued respondent for an alleged violation of the disclosure requirements of Minn. Stat. § 513.55 (2012) (requiring seller to disclose defects “in good faith and based upon the best of the seller’s knowledge at the time of the disclosure”).¹

Almost a year later, and after the discovery deadline established by the scheduling order had passed, respondent moved for summary judgment or, alternatively, for dismissal for failure to state a claim. In his memorandum of law, respondent disclaimed any intent to base his summary judgment motion on the question of his awareness of the alleged rot. However, respondent did not concede the issue. He argued that summary judgment was appropriate on other grounds.

¹ The complaint included another count that was dismissed by agreement of the parties and is not at issue in this appeal.

Appellants' two-page responsive memorandum argued that summary judgment was inappropriate because "Defendant *failed to disclose* the existence of substantial rot and decay in a loadbearing wall, although Defendant *was aware* of the condition." (Emphasis added.) Appellants argued that they would be entitled to damages, "[a]ssuming [they] carr[ied] their burden of proof of those facts."

Respondent filed a reply memorandum, attaching an affidavit of respondent in which he disclaimed any knowledge of damage to the property other than that disclosed in the seller's property disclosure. At the hearing on respondent's motion, appellants' counsel neither offered any evidence to rebut respondent's affidavit nor requested additional time to submit such evidence. Appellants' responses to the dispositive motion included no affidavits, no deposition transcripts, no written discovery responses, and nothing beyond the two-page memorandum of counsel and an unsworn real estate appraisal.²

Following the hearing on respondent's motion, the district court granted respondent's motion for summary judgment. The district court determined that summary judgment was appropriate because there was record evidence that respondent had never lived in the house and that he had disclosed all issues of which he was aware, while appellants had offered and could point to no record evidence regarding respondent's "knowledge (or lack of knowledge) of the damage." The district court concluded that

² At the summary judgment hearing, respondent's counsel objected to the district court's consideration of the unsworn appraisal. Appellants stated that they could provide a sworn affidavit from the appraiser if necessary. Appellants did not do so. However, the district court did not address this issue because it granted summary judgment on other grounds.

there were no genuine issues of material fact and dismissed appellants' claim pursuant to Minn. R. Civ. P. 56. This appeal followed.

D E C I S I O N

Appellants argue that the district court erred by considering the affidavit that accompanied respondent's reply memorandum. Appellants maintain that the question of respondent's awareness of the rot was raised for the first time in that reply memorandum.

We review a district court's procedural and evidentiary rulings for an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). When the district court considers an argument over an objection that a party was not afforded a meaningful opportunity to respond, the question is one of "fundamental fairness." *Bradley v. First Nat'l Bank of Walker, N.A.*, 711 N.W.2d 121, 128 (Minn. App. 2006).

Under the Minnesota Rules of Civil Procedure, a motion for summary judgment permits "[a] party against whom a claim . . . is asserted . . . [to] move with or without supporting affidavits for summary judgment in the party's favor." Minn. R. Civ. P. 56.02. Proceedings on the motion are conducted in accordance with Minn. Gen. R. Prac. 115.03, and "[j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03.

Under the Minnesota General Rules of Practice, the party responding to a motion for summary judgment may file a responsive memorandum of law, accompanied by

supporting affidavits and exhibits. Minn. Gen. R. Prac. 115.03(b). If the responsive memorandum raises an issue of law or fact that was not raised in the moving party's original memorandum, then the moving party may file a reply memorandum. Minn. Gen. R. Prac. 115.03(c); *Bradley*, 711 N.W.2d at 128.

Here, almost a year had passed since respondent had asserted in his answer that he denied any knowledge of the alleged rot. The discovery deadline had passed. While respondent's original memorandum did not expressly raise the issue of respondent's knowledge of the alleged rot and addressed primarily other issues, appellants were on notice that respondent's knowledge was at issue. Somewhat inexplicably, appellants then expressly raised the issue in their responsive memorandum, but they did not offer any evidentiary support for their allegations. Respondent then addressed the issue, *which appellants themselves had raised*, in a reply memorandum and accompanying affidavit. Appellants did not request that the record be held open or that the summary judgment hearing be continued to further develop the record.

This is not a case where appellants were surprised by an issue being raised for the first time during the litigation. *Cf. Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 620–21 (Minn. App. 2000) (holding that appellants were prejudiced where, at the summary judgment hearing, the district court allowed respondent to orally amend his answer without prior notice to add a dispositive affirmative defense). It was not an abuse of discretion, nor was it fundamentally unfair, for the district court to consider the affidavit accompanying respondent's reply brief. *See Bradley*, 711 N.W.2d at 128.

Nor are we persuaded that the district court was precluded from considering the issue of respondent's knowledge on the basis of respondent's original motion papers. Minn. R. Civ. P. 56.03 gives authority to the district court "to enter judgment for either party, including a non-moving party, on the basis of the documents before the court when the motion is made." *Leidall v. Grinnell Mut. Reinsurance Co.*, 374 N.W.2d 532, 535 (Minn. App. 1985). A party may not rely on mere averments in their pleadings to avoid summary judgment. Minn. R. Civ. P. 56.05.

The state of the record at the conclusion of the motion hearing was that there was no evidence in the record demonstrating respondent's knowledge of the rot. Our own review of the record persuades us that the record reveals no genuine issue of material fact with respect to respondent's knowledge. Therefore, the district court did not err in granting summary judgment based on that complete failure of proof.

Affirmed.