

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.

BRIEF AND APPENDIX OF RESPONDENT JON MUIR

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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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STATEMENT OF ISSUES

I. Did the trial court err by confirming the statutory cancellation of the Farr/Dimke Purchase Agreement?

The trial court confirmed that the Farr/Dimke Purchase Agreement was cancelled pursuant to Minn. Stat. § 559.217, subd. 4.

II. Could the trial court have dismissed the Dimkes' claim against Muir without determining that the Farr/Dimke Purchase Agreement had been statutorily cancelled?

Having already determined that the Farr/Dimke Purchase Agreement had been nullified, the trial court did not specifically address Muir's alternative basis for seeking summary judgment based on the Dimkes' inability to produce factual evidence supporting their claim that Muir had intentionally interfered with their contractual relations.

STANDARD OF REVIEW

On appeal from summary judgment, an appellate court must consider whether any genuine issues of material fact exist and whether the trial court erred in its application of the law. *Leamington Co. v. Nonprofits' Insurance Association*, 615 N.W.2d 349 (Minn. 2000). In doing so, an appellate court must view the evidence in a light most favorable to the party against whom summary judgment was granted. *Motor Sports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320 (Minn. 2003). When a trial court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion to be reviewed *de novo* by an appellate court. *Lefto v. Hoggsbreath Enters, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

STATEMENT OF THE CASE

This action was commenced by Plaintiffs Robert and Mary Dimke (“the Dimkes”) on October 25, 2010. (D. App. 1). The Complaint alleges claims against Defendants Naomi and Darrel Farr (“the Farris”) for specific performance, breach of contract and breach of covenants of good will and fair dealing, all in connection with an August 8, 2010 Purchase Agreement between the Farris and the Dimkes (“the Farr/Dimke Purchase Agreement”). (D. App. 3-4). The Complaint also alleges that Defendant Jon Muir (“Muir”) had tortiously interfered with the Farr/Dimke Purchase Agreement by seeking to close on the three April 7, 2010 Purchase Agreements Muir had entered into with Defendant Naomi Farr (“the Farr/Muir Purchase Agreements”) relating to the same real estate. (D. App. 4). The Dimkes also filed a Notice of Lis Pendens against the property. (D. App. 39).

The Farrs and Muir each answered the Complaint, denying each of the Dimkes' claims and also asserting Counterclaims against the Dimkes. (D. App. 41, 63). Farrs asserted counterclaims for slander of title, abuse of process and tortious interference with contract (D. App. 44-49), while Muir counterclaimed against the Dimkes alleging tortious interference with contract (the Farr/Muir Purchase Agreement) and abuse of process. (D. App. 66-67). Muir also asked for the declaration of the Court that Muir's interest in the subject property was prior and superior to that of the Dimkes. (D. App. 67).

On November 22, 2010 each of the parties filed motions for summary judgment seeking the dismissal of all claims against those parties. (D. App. 149, 151, 153). Muir's motion for summary judgment was primarily based on the fact that the undisputed evidence demonstrated that the Dimkes could not establish a claim against Muir for tortious interference with Dimike's contractual relations. (Add. 1). In addition, Muir and the Farrs both sought an order requiring the Dimkes to discharge the Lis Pendens against the subject property. (D. App. 151, 153).

A hearing relating to all motions was held on December 20, 2010. On January 14, 2011 the trial court issued Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree granting summary judgment to Muir and the Farrs and dismissing the Dimkes' claims against all Defendants. The trial court also ordered that the November 5, 2010 Lis Pendens be discharged. (Add. 1). The Dimkes appealed on January 14, 2011. (D. App. 377-378).

STATEMENT OF THE FACTS

On or about April 7, 2010 Defendant Naomi Farr (“Farr”) and Defendant Muir entered into three separate Purchase Agreements relating to three contiguous parcels of real estate owned by Farr at 7465 Roy Lake Road on Gull Lake in Cass County, Minnesota. (D. App. 156, 178, 198). The parcels are referred to by the parties in various communications and documents as the “Main House,” “Boat House Lot” and “Vacant Land Property.” As indicated in the respective Purchase Agreements, the purchase price on the Main House parcel was \$1,575,000 (D. App. 156), the purchase price on the Boat House parcel was \$300,000 (D. App. 178) and the purchase price on the Vacant Land Property was \$245,000 (D. App. 198), for a total purchase price on all three parcels of \$2,120,000.

After experiencing an inability to secure financing on April 22, 2010 Muir presented Farr with a proposed cancellation. (D. App. 275, M. App. 1). Farr refused to sign the proposed cancellation (M. App. 1-2) and subsequently brought suit against Muir seeking specific performance or, in the alternative, money damages. (D. App. 276-287). None of the three Farr/Muir Purchase Agreements were ever canceled. (M. App. 2).

On or about August 8, 2010 the Farris and the Dimkes entered into a Purchase Agreement for the Main House property for a purchase price of \$1,000,000. (D. App. 243-274). Lines 48 through 53 of the Farr/Dimke Purchase Agreement specifically state:

“This Purchase Agreement is subject to cancellation of a previously written Purchase Agreement dated _____
(If answer is IS, said cancellation shall be obtained no later than N/A,
N/A. If said cancellation is not obtained by said date, this Purchase Agreement is canceled. Buyer and Seller shall immediately sign a

Cancellation of Purchase Agreement confirming said cancellation and directing all earnest money paid hereunder to be refunded to Buyer.)” (D. App. 244).

Closing on the Farr/Dimke Purchase Agreement was eventually scheduled to occur on September 10, 2010. (D. App. 289).

On or about September 9, 2010, Muir’s attorney notified Farr’s attorney of Muir’s willingness to close on the three Farr/Muir Purchase Agreements for the same purchase prices (contrary to the allegation contained in the Dimkes’ Complaint) as stated on those three Purchase Agreements. (D. App. 343). Closing on the three Farr/Muir Purchase Agreements was eventually scheduled to occur on October 20. (M. App. 4).

By letter dated September 20, 2010, Stephen Thorson, attorney for the Dimkes at that time, notified the Farris’ attorney of numerous title objections relating to the property. (D. App. 51-54). According to Thorson, the “most significant objection” was the existence of the district court action commenced by Farr against Muir which rendered title to the property “unmarketable.” (D. App. 51-52). Per Mr. Thorson’s letter, Farris were given a deadline of October 12, 2010 to make title marketable. (D. App. 53-54). None of the objections noted on Thorson’s September 20, 2010 letter were ever satisfied by the Farris.

On or about October 13 and again on October 18, 2010, the Farris presented the Dimkes with proposed cancellations of the Farr/Dimke Purchase Agreement. (D. App. 292, 326, 329). The Dimkes refused to sign the proposed cancellations. Therefore, on October 19, 2010, one day prior to the scheduled closing of the three Farr/Muir Purchase Agreements, Farr’s attorney advised Muir’s attorney that the Dimkes had refused to agree

to cancel their Purchase Agreement with the Farrs. (M. App. 2). For that reason, title on the property was uninsurable and the closing on the Farr/Muir Purchase Agreements was canceled. (M. App. 2).

On or about October 20, 2010, the Farrs caused to be served on the Dimkes a Notice of Cancellation pursuant to Minn. Stat. § 559.217 providing that the Farr/Dimke Purchase Agreement would be canceled “15 days after service of this notice upon you unless before then you secure from a district court an order that the confirmation of cancellation of the Purchase Agreement be suspended until your claims or defenses are finally disposed of by trial, hearing, or settlement.” (D. App. 292, 339). No such order was secured by the Dimkes. Therefore, an Affidavit of Cancellation memorializing the termination of the Farr/Dimke Purchase Agreement was served on Dimkes’ counsel on November 8, 2010. (D. App. 292, 338).

On or about October 29, 2010, Plaintiffs commenced the present action against the Farrs and Muir seeking 1) specific performance against Farrs, 2) damages against Farrs for breach of contract, and 3) damages against Farrs for breach of implied covenant of good faith and fair dealing. (D. App. 3-4). Plaintiffs also sought damages against Muir based on Muir’s alleged tortious interference with the Farr/Dimke Purchase Agreement. Specifically, the Complaint alleged that “Muir intentionally procured the breach of the Dimkes’ purchase agreement by subsequently agreeing to purchase the Main House property for a higher price than agreed to between the Farrs and the Dimkes” (D. App. 4), an allegation for which there is no factual support contained in the record.

LEGAL ARGUMENT

A. THE TRIAL COURT CORRECTLY CONFIRMED THAT THE FARR/DIMKE PURCHASE AGREEMENT HAD BEEN CANCELLED PURSUANT TO MINN. STAT. § 559.217, SUBD. 4.

1. There is no ambiguity in the statute.

When a trial court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion to be reviewed *de novo* by an appellate court. *Lefto v. Hoggsbreath Enters, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). The interpretation of a statute also is a question of law that is to be reviewed *de novo* by an appellate court. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005).

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. *Glen Paul Court Neighborhood Association v. Paster*, 437 N.W.2d 52, 56 (Minn. 1989). Therefore, the first task of the Court “is to determine whether the statute needs interpreting—that is, whether the language of the statute is ambiguous” *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). If the statute is “clear and free from all ambiguity,” the plain meaning of the statute controls, and the clear language of the statute is not to be “disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16 (2008); *Phelps v. Commonwealth Land Title Insurance Co.*, 537 N.W.2d 271, 274 (Minn. 1995). As the Minnesota Supreme Court noted in *Phelps*, “Where the intention of the legislature is clearly manifested by plain unambiguous language... no construction is necessary or permitted.” 537 N.W.2d at 274.

Without specifically identifying any ambiguity contained in Minn. Stat. § 559.217, subd. 4, the Dimkes nevertheless suggest that some unstated ambiguity exists or that the

trial court failed to interpret the statute properly. But the statute is clear on its face. Therefore, there was no need for the trial court to “interpret” it. Instead, the trial court simply followed the clear language of the statute in confirming the cancellation of the Farr/Dimke Purchase Agreement.

Minn. Stat. § 559.217, subd. 4 states, in pertinent part:

Subd. 4. Declaratory cancellation.

(a) If an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either the purchaser or the seller may confirm the cancellation by serving upon the other party to the purchase agreement and any third party that is holding earnest money under the purchase agreement a notice:

(1) specifying the residential real property that is the subject of the purchase agreement, including the legal description;

(2) specifying the purchase agreement by date and names of parties, and the unfulfilled condition; and

(3) stating that the purchase agreement has been canceled.

(b) The notice must be served in the manner provided in section 559.21, subdivision 4, paragraphs (a) and (b).

(c) The cancellation of the purchase agreement is complete, unless, within 15 days after the service of the notice upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation.

There is no ambiguity in the statute. It provides a straightforward procedure to be followed by either a purchaser or a seller to confirm the cancellation of a purchase agreement. The statute also contains an unambiguous mechanism to protect the legitimate interests of a party who desires to dispute that a cancellation has occurred.

Specifically, if the Dimkes had believed that there was no “unfulfilled condition” in their Purchase Agreement, they could have sought an order from the trial court suspending the cancellation. For reasons known only to the Dimkes, they did not seek such an order. Therefore, the cancellation was confirmed in the manner clearly established by the legislature.

As noted by the trial court, Minn. Stat. § 559.217, subd. 4 was enacted to clarify the interests of the parties to a purchase agreement and “provides for a method of stability in the real estate market which extinguishes claims unless immediate action is taken to preserve those claims.” (Add. 4). Indeed, allowing the Dimkes to utilize an alternative method of protecting their right to challenge the cancellation (one not utilizing the specific procedures set forth in Minn. Stat. § 559.217, subd. 4) would clearly frustrate the clear intent of the legislature.

2. The FARRS followed the correct statutory procedure in cancelling the Farr/Dimke Purchase Agreement.

There is no dispute as to the material facts giving rise to the cancellation of the Farr/Dimke Purchase Agreement, nor is there any suggestion that the FARRS did not follow the specific requirements of Minn. Stat. § 559.217, subd. 4. Therefore, the statutory cancellation was effective and complete. For that reason, the trial court’s dismissal of the Dimkes’ claims against the FARRS and Muir was appropriate.

It is undisputed that the Farr/Dimke Purchase Agreement contains specific language providing for the cancellation of that contract in the event the Farr/Muir Purchase Agreement was not cancelled by Naomi Farr. It is also undisputed that by not

obtaining the cancellation of the Farr/Muir Purchase Agreement by the date of the projected closing on the Farr/Dimke Purchase Agreement, the Farris could not provide marketable title to the property. That fact was clearly acknowledged by the Dimkes' attorney in his September 20, 2010 letter to the Farris' attorney. In fact, the Dimkes' attorney specifically noted that the Farr property continued to be "unmarketable" even ten days after the date set for closing. Pursuant to the Dimkes' attorney's September 20, 2010 letter, the Farris were given until October 12, 2010 to satisfy the Dimkes' objections to title. None of the objections were ever satisfied by the Farris.

Moreover, it is undisputed that the Farris served a Notice of Cancellation on the Dimkes in October, 2010 and that the Dimkes did not secure (or even attempt to secure) a court order suspending the cancellation within 15 days after service of the notice upon them. Therefore, under the unambiguous language of Minn. Stat. § 519.217, Subd. 4(a), the cancellation was "complete" as of November 5, 2010. For that reason, unless the clear intent of the legislature is ignored, the inquiry should go no further.

3. The Dimkes' failure to seek a suspension of the statutory cancellation nullified their right to question whether an unfulfilled condition existed.

If the Dimkes had bothered to challenge the Notice of Cancellation as mandated by the statute, perhaps they could have argued (unsuccessfully) to the district court that there was no unfulfilled condition in their Purchase Agreement with the Farris. But they did not seek or obtain a court order suspending the cancellation. Therefore, the cancellation was complete.

Instead of challenging the cancellation as required by the statute, the Dimkes contend that commencing suit against the Farris and Muir within 15 days of the service of the Notice of Cancellation upon them satisfied their legal obligation to promptly protect their contractual rights. But commencing a lawsuit is not the equivalent of “securing from a court an order suspending the cancellation” as required by the specific language of Minn. Stat. § 559.217, subd. 4(c). Therefore, the Dimkes waived their right to challenge the underlying basis for the cancellation of their Purchase Agreement.

B. EVEN IF THE STATUTORY CANCELLATION OF THE FARR/DIMKE PURCHASE AGREEMENT WERE TO BE DEEMED INEFFECTIVE, MUIR IS STILL ENTITLED TO SUMMARY JUDGMENT AGAINST THE DIMKES.

The basis of Muir’s motion for summary judgment against the Dimkes was two-fold. First, Muir argued (as did the Farris) that the Farr/Dimke Purchase Agreement had been cancelled and that therefore Muir could not be held liable for interfering with a contract that did not exist. Second, Muir argued that even if the Farr/Dimke Purchase Agreement had not been cancelled, the undisputed evidence clearly demonstrated that the Dimkes could not establish any of the elements necessary to prevail against Muir on a claim for intentional interference with contractual relations. Although the trial court relied on the statutory cancellation of the Farr/Dimke Purchase Agreement to dismiss Dimkes’ claims against both the Farris and Muir, the trial court could also have based its decision on Muir’s alternative argument that he had not unjustly interfered with the Farr/Dimke Purchase Agreement.

In order to establish a claim for tortious interference with contractual relations, the Dimkes needed to prove all of the following five elements:

- 1) The existence of a contract;
- 2) Muir's knowledge of the contract;
- 3) Muir's intentional procurement of its breach;
- 4) A lack of justification; and
- 5) Damages.

Royal Realty Co. v. Levin, 69 N.W.2d 667 (Minn. 1955). The undisputed evidence demonstrates that the Dimkes could not establish any of those elements.

1. The Purchase Agreement Between The FARRS And The Dimkes Was Nullified By The Terms Of That Agreement.

Although the FARRS and the Dimkes signed a Purchase Agreement on or about August 8, 2010, it was unambiguously subject to the condition that FARRS obtain the cancellation of an existing (FARRS/Muir) Purchase Agreement. Because FARRS did not fulfill that condition, and because the Dimkes refused to sign a voluntary cancellation, the specific terms of the FARRS/Dimkes Purchase Agreement provided that it was canceled. The FARRS thereupon confirmed the cancellation pursuant to Minn. Stat. § 559.217. Therefore, the FARRS/Dimkes Purchase Agreement is a nullity which Muir could not have interfered with.

2. Muir Could Not Have Had Knowledge Of The FARRS/Dimkes Purchase Agreement At The Time Muir Signed His Purchase Agreements With FARRS.

Muir's Purchase Agreements with Naomi FARRS preceded the FARRS/Dimkes Purchase Agreement by approximately four months. Therefore, Muir could not have known of the

existence of the Farr/Dimke Purchase Agreement at the time he entered into the Farr/Muir Purchase Agreements.¹ Muir eventually learned that the Farris may have subsequently entered into another Purchase Agreement relating to some or all of the same property that he was purchasing from Naomi Farr, but Muir knew nothing of the details of that transaction and he also knew that his Purchase Agreements continued to be viable. Therefore, he understood that his contractual rights were superior to any subsequent individuals who might have wanted to purchase the property.

3. Muir Did Not Procure The Breach Of The Farr/Dimke Purchase Agreement.

Notwithstanding the blatant misstatement contained in the Dimkes' Complaint that Muir had intentionally procured the breach of the Farr/Dimke Purchase Agreement by subsequently agreeing to pay more for the Farr property than he had originally offered, there is no evidence in the record to support that claim, or that Muir otherwise interfered with the Farr/Dimke Purchase Agreement. Instead, Muir simply proceeded to attempt to close on his own Purchase Agreements with Farr, which were undeniably signed long prior to the Farr/Dimke Purchase Agreement. Indeed, if anyone is liable for interference with contractual relations it is the Dimkes, who signed a Purchase Agreement with Farr with full knowledge that the property had already been sold to another party, who conditioned their closing on Farr's cancelling the Farr/Muir Purchase Agreement, and who then refused to voluntarily agree to the cancellation of their Purchase Agreement in order to allow the Farr/Muir transaction to close.

¹ The Dimkes, on the other hand, were aware of the Farr/Muir Purchase Agreements and they clearly and intentionally sought its breach.

As noted above, the Dimkes' assertion that Muir procured the Farrs to breach their Purchase Agreement "by subsequently agreeing to purchase the Muir House Property for a higher price than agreed to between the Farrs and the Dimkes" is completely without merit. In reality, the September 9, 2010 letter from Muir's attorney to the Farrs' attorney specifically states that Muir was prepared to close on the April 7, 2010 Purchase Agreements, not on some modification of those Agreements. In fact, the letter included a contemporaneous document from Bremer Bank confirming that Muir had been approved for financing up to \$1,575,000, the exact purchase price stated on the April 7, 2010 Main House Purchase Agreement. Therefore, the Dimkes' allegation is factually incorrect and for that reason alone their claim against Muir must fail.

4. Muir Was Justified In Proceeding With A Closing On His Purchase Agreements With Farr.

Dimkes have not and cannot support their assertion that Muir's actions were unjustified. Muir did nothing but seek to close on his own Purchase Agreements, contracts that preceded the Farr/Dimke Purchase Agreement by a period of four months. Moreover, Muir's decision to close on his Purchase Agreements essentially negated any potential (but disputed) liability that he might face in the lawsuit commenced on him by Naomi Farr. Therefore, Muir's actions were reasonable and clearly justified under the circumstances.

5. The Dimkes Have Not Been Damaged By Any Action Taken By Muir.

Muir has done nothing to damage the Dimkes, who knowingly signed a Purchase Agreement relating to property that was subject to an existing Purchase Agreement. They made no effort to determine the identity of the existing purchaser or to determine

how the Farris intended to cancel the existing Purchase Agreement. If the Dimkes have sustained damage, it was because of their own actions and not at the hands of Muir.

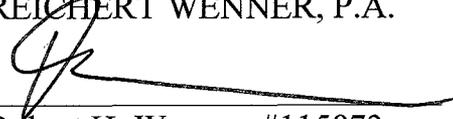
In sum, it would be impossible for the Dimkes to prevail against Muir based on a claim of Muir's alleged interference with the Farr/Dimke Purchase Agreement. Muir's Purchase Agreements preceded the Farr/Dimke Purchase Agreement by four months. Muir's Purchase Agreements were never cancelled. The Farr/Dimke Purchase Agreement was cancelled. Muir was fully justified in seeking to close on his Purchase Agreements since he never wavered in his desire to own the Gull Lake properties and because he wanted to put an end to the legal action that Naomi Farr had commenced against him. Finally, the Dimkes have not been damaged by Muir's actions. Therefore, rather than proving all of the elements of a claim for intentional interference with contract, the Dimkes cannot prove any of those elements. For that reason, summary judgment against the Dimkes was warranted.

CONCLUSION

The undisputed facts and the unambiguous language of Minn. Stat. § 559.217, subd. 4 clearly justified the dismissal of the Dimkes' claim against the Farris and Muir. It is clear that the Farr/Dimke Purchase Agreement was properly cancelled pursuant to the unambiguous requirements of the statute. It is also apparent that the Dimkes' failure to seek an order suspending the cancellation within the 15 day period mandated by the statute constituted a waiver of their right to challenge the cancellation. Finally, the Dimkes have not and cannot support a claim against Muir for allegedly interfering with

their contractual relationship. Therefore, Respondent Jon Muir respectfully requests that the trial court's decision dismissing the Dimkes' claims against him be affirmed.

Respectfully submitted,
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Dated: May 9, 2011

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