STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1942

Michael Reese,
Respondent,

vs.

Douglas DuSold, et al.,
defendants and third party plaintiffs,
Appellants,

vs.

John Florhaug,
third party defendant,
Respondent.

Filed September 19, 2011
Reversed
Bjorkman, Judge

Beltrami County District Court
File No. 04-C8-06-001203

Jason D. Pederson, Fuller, Wallner, Cayko & Pederson, Ltd., Bemidji, Minnesota (for respondent Michael Reese)

Steven C. Opheim, Mark K. Thompson, Dudley & Smith, P.A., St. Paul, Minnesota (for appellants)

John Florhaug, Bemidji, Minnesota (pro se respondent)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant landowners challenge the district court's determination that they breached a valid farming lease by failing to permit respondent farmer to exercise his first-refusal right. Because we conclude that the lease was valid and that respondent received notice of the proposed sale of the property through his agent, we reverse.

FACTS

In 1991, appellants Douglas DuSold and Dorothy DuSold purchased 720 acres of wild-rice farmland in Beltrami County, known as Tamarac Farm. From 1991 to 1998, respondent John Florhaug operated Tamarac Farm for the DuSolds on a crop-share basis. In 1999 and 2000, the DuSolds farmed the property themselves. Florhaug resumed farming Tamarac Farm from 2001 to 2004 as a tenant, pursuant to an oral agreement with the DuSolds.

When his lease with the DuSolds expired, Florhaug arranged for respondent Michael Reese to lease the property. Florhaug was involved in preparing the lease "because of his working relationship" with both Reese and Douglas DuSold. The lease provided for Reese's use of Tamarac Farm from November 30, 2004, to November 30, 2009, in exchange for rent payments of $5,000 per year, payable in installments on April 15 and October 15 of each year. The lease contained a right of first refusal that provided, "[Reese] shall have the right of first refusal on the sale and purchase of land. [Reese] may transfer lease to John Florhaug if their sale does not go through." The lease required the DuSolds to provide Reese with written notice of any defaults. The lease further

required the DuSolds to send written notices to Reese at Florhaug's farm in Kelliher. Reese was the only tenant listed on the lease.

Reese operated Tamarac Farm while also farming property that he owned in southern Minnesota. Florhaug helped Reese with the farming operation, and Reese stayed at the Florhaug farm while in Kelliher. As part of Florhaug's farming assistance, Florhaug provided Reese with a summary of the 2005 Tamarac Farm expenses. This summary indicated that the rent for the farm had been paid, reflected in a $5,000 reduction in profits Reese would otherwise have received. In fact, the rent had not been paid to the DuSolds; Florhaug believed the DuSolds owed him money for prior work and reduced that debt by the $5,000 he retained. The DuSolds did not give Reese written notice of the unpaid rent.

In September 2005, Douglas DuSold was contacted by a real estate agent about selling Tamarac Farm. DuSold indicated he would sell the farm subject to several contingencies, including that any purchase was subject to a right of first refusal by the current tenant, whom he identified as Florhaug. DuSold spoke with Florhaug by phone about the proposed sale and sent Florhaug a notice of sale by certified letter at the Florhaug farm address—the address at which Reese requested written notices be sent pursuant to the lease. Florhaug contacted Reese to discuss the proposed sale and conducted his own investigation. Reese took no action. The DuSolds ultimately sold Tamarac Farm to a third party, who immediately transferred the property to another purchaser in a second closing.

Reese learned of the sale and initiated this action against the DuSolds and the purchaser, requesting that the district court order the farm to be conveyed to Reese by warranty deed or that the district court award him damages for breach of the lease agreement's right of first refusal. The DuSolds counterclaimed against Reese for unpaid rent and filed a third-party claim against Florhaug for contribution and indemnity, alleging that Florhaug was Reese's agent.

After a bench trial, the district court determined that the lease between Reese and the DuSolds was enforceable and contained a valid right of first refusal. The court found that the DuSolds did not provide Reese with written notice of his failure to pay rent or of the proposed sale of the property. Based on its determination that the DuSolds breached the lease agreement by selling the property without regard for the first-refusal provision, the district court awarded Reese damages in the amount of $475,968.[1] The district court denied the DuSolds' motion for a new trial or amended findings. This appeal follows.

D E C I S I O N

A district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In applying this rule, "we view the record in the light most favorable to the judgment" and "[i]f there is reasonable evidence to support the district court's findings, we will not disturb them." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). But

[1] To account for the missed rent payment, the district court reduced the award by $5,000, plus interest.

"[a]n appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001).

I. The parties executed an enforceable lease supported by consideration.

The DuSolds first challenge the district court's determination that the lease with Reese is valid, arguing that the lease is "unenforceable" for lack of consideration. The existence of consideration presents a question of law, which we review de novo. *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999).

To be enforceable, an agreement or promise requires consideration. *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538-39, 104 N.W.2d 661, 665 (1960). But it is long-settled contract law that mutual promises "are a sufficient consideration for each other." *Koehler & Hinrichs Merc. Co. v. Ill. Glass Co.*, 143 Minn. 344, 346, 173 N.W. 703, 704 (1919). And "Minnesota follows the long-standing contract principle that a court will not examine the adequacy of consideration as long as something of value has passed between the parties." *Brooksbank*, 586 N.W.2d at 794 (quotation omitted).

The DuSolds argue that Reese's failure to pay rent under the lease constitutes lack of consideration that renders the lease unenforceable. Reese argues that his "promise to perform" provided the requisite consideration to create a valid lease and that nonpayment of rent does not make the lease unenforceable because the DuSolds failed to notify him in writing of the missed payment. We agree with Reese and the district court that the lease is valid.

First, the undisputed record evidence establishes that there was adequate consideration for the lease. Among other things, the DuSolds promised to convey possession of Tamarac Farm throughout the term of the lease and promised to provide Reese with first-refusal rights. In exchange, Reese promised to pay rent and maintain the farm. Both parties promised "something of value" in entering the lease. *See Brooksbank*, 586 N.W.2d at 794. These mutual promises provide the necessary consideration for the lease. *See Kielley v. Kielley*, 674 N.W.2d 770, 777-78 (Minn. App. 2004) (stating that "[w]here promises are mutual, made concurrently, and incorporated into a bilateral contract, such promises are sufficient consideration for each other").

Second, the parties' alleged failures to perform their respective duties under the lease do not destroy or invalidate the consideration for the lease. The record supports the DuSolds' assertion that they did not receive rent payments from Reese. And the record also supports the district court's determination that Reese "did not receive notice" that the DuSolds did not receive the rent payments. While the record supports findings that both the DuSolds and Reese failed to perform under the lease, these claimed failures constitute breaches of the lease that do not implicate the adequacy of consideration. *See Associated Cinemas of Am., Inc. v. World Amusement Co.*, 201 Minn. 94, 99, 276 N.W. 7, 10 (1937) (stating that the failure or refusal of a party to a contract to perform a duty imposed is a breach of that contract). Accordingly, we conclude that the lease was supported by adequate consideration, and the parties' alleged performance failures do not invalidate the lease.

II. The DuSolds complied with the first-refusal lease provision by notifying Reese's agent, Florhaug, of the proposed sale.

The DuSolds next argue that they did not breach the first-refusal provision of the lease because Reese received notice of the proposed sale through Florhaug, contending that Florhaug and Reese had an agency relationship and receipt of the sale notice was within the scope of Florhaug's apparent authority. Generally, whether an agent acted with the principal's authority is a question of fact. *Gulbrandson v. Empire Mut. Ins. Co.*, 251 Minn. 387, 391, 87 N.W.2d 850, 853 (1958). But the existence of an agency relationship is "ultimately a legal determination." *In re Ins. Agents' Licenses of Kane*, 473 N.W.2d 869, 873 (Minn. App. 1991), *review denied* (Minn. Sept. 25, 1991).

"Agency is the fiduciary relationship that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). "An agency relationship may be established even though the parties did not call it an agency relationship and did not intend the legal consequences of such relationship." *Kane*, 473 N.W.2d at 873. And the existence of the agency "may be proved by circumstantial evidence which shows a course of dealing between the two parties," provided it can be shown that the principal consented to the agency. *Jenson Farms*, 309 N.W.2d at 290.

An agent can bind his principal if he has actual or apparent authority. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 499, 176 N.W.2d 552, 555 (1970). "Apparent authority is that authority which a principal holds an agent out as

possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988). To find apparent authority, (1) the principal "must have held the agent out as having authority, or must have knowingly permitted the agent to act on its behalf," (2) third parties "must have [had] actual knowledge that the agent was held out by the principal as having such authority or had been permitted by the principal to act on its behalf," and (3) "proof of the agent's apparent authority must be found in the conduct of the principal, not the agent." *Hockemeyer v. Pooler*, 268 Minn. 551, 562, 130 N.W.2d 367, 375 (1964). In determining whether apparent authority exists, the court may consider any statements, conduct, lack of ordinary care, or manifestations of the principal's consent, such that a third party might be justified in concluding that the agent acted with apparent authority. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

In rejecting the DuSolds' argument that they complied with the first-refusal notice requirement, the district court determined that Reese and Florhaug did not have a partner or agency relationship. The DuSolds contend that Reese created an agency relationship with Florhaug by "allowing all communications and negotiations . . . to go through Mr. Florhaug," and that Florhaug performed "all affirmative acts in the creation of the lease." They also emphasize Reese's reliance on Florhaug to pay rent and otherwise manage certain business aspects of the farming operation. Reese emphasizes that nothing in the written lease indicates an agency relationship, that he and Florhaug testified that they did not have a partnership or agency relationship, and that Florhaug "never told" Douglas DuSold that they were partners.

We first consider whether Reese and Florhaug had an agency relationship in connection with the lease. It is undisputed that Florhaug prepared the first draft of the lease on behalf of Reese. The record supports the district court's determination that the lease "was prepared by Mr. Florhaug because of his working relationship with both Mr. Reese and Mr. DuSold." The evidence shows that Douglas DuSold mailed the executed copy of the lease to Florhaug, who forwarded copies to both Reese and Reese's lender. In short, Florhaug undertook all actions related to the drafting, negotiation, and delivery of the lease on Reese's behalf. The DuSolds understood that Florhaug was acting on Reese's behalf, and Reese does not dispute that he permitted and consented to Florhaug's actions.

Moreover, throughout 2005, Reese relied on Florhaug to prepare and maintain the Tamarac Farm financial records. Reese admitted that while he was "the one responsible for paying the rent," he "relied" on Florhaug to pay the rent "at the time [Florhaug] was helping" work the farm, and believed Florhaug had done so using funds that Reese otherwise would have received as profit. Reese's ongoing reliance on Florhaug to perform a critical duty under the lease—the payment of rent—is a further "manifestation[]" of Reese's consent to the agency relationship. *See id.* Reese "knowingly permit[ted]" Florhaug to communicate with DuSold and act on his behalf throughout the entire relationship. *See Foley*, 427 N.W.2d at 652. These actions established a "course of dealing" between the parties such that Douglas DuSold was justified in believing Florhaug was acting on Reese's behalf. *See Jenson Farms*, 309

N.W.2d at 290. On this record, we conclude that an agency relationship existed between Reese and Florhaug throughout the formation and execution of the lease.

Having concluded that Florhaug was Reese's agent, we next consider whether receiving and acting upon the DuSolds' notice of the proposed sale of Tamarac Farm was within the scope of the agency. As a general rule, "notice given to an agent is notice to the principal." *Rognrud v. Zubert*, 282 Minn. 430, 436, 165 N.W.2d 244, 249 (1969) (quotations omitted). But "notice to an agent, to be binding on, and constitute constructive or implied notice to, the principal, must be of facts within the scope of the agency." *Jackson v. Mut. Benefit Life Ins. Co.*, 79 Minn. 43, 47, 81 N.W. 545, 546 (1900). Because Reese denies authorizing Florhaug to act as his agent with respect to the first-refusal, we analyze whether Florhaug had apparent authority. "[T]he scope of apparent authority is determined not only by what the principal knows and acquiesces in, but also by what the principal should, in the exercise of ordinary care and prudence, know his agent is doing." *Duluth Herald*, 286 Minn. at 499, 176 N.W.2d at 555-56 (quotation omitted).

The lease directed the DuSolds to mail all written communications to Reese at the Florhaug farm, including notice of a pending sale under the first-refusal provision. While DuSold sent timely notice of the proposed sale to the proper address, the letter was addressed to Florhaug rather than Reese. The DuSolds contend that Florhaug's ongoing "role as a conduit" between the parties made it "reasonable" for DuSold to believe that Florhaug had authority to receive notice on Reese's behalf. We agree.

It is undisputed that Florhaug advised Reese of the notice, offered to investigate the circumstances surrounding the proposed sale, and reported back to Reese that he was personally skeptical about the sale, indicating that it "looked kind of fishy." Reese "made no independent inquiry" regarding the pending sale, allowing Florhaug to investigate on his behalf. In short, Reese knew of and acquiesced in Florhaug's actions, further highlighting the broad "scope" of the agency, which now encompassed the creation of the lease, payment of rent, and investigating a possible sale. *See Jackson*, 79 Minn. at 46-47, 81 N.W. at 546. On this record, we conclude that Florhaug had apparent authority to receive notice of the proposed sale under the first-refusal provision on Reese's behalf. Because it is undisputed that the DuSolds provided the requisite notice to Florhaug, the district court erred in finding the DuSolds in breach of the lease. Because we reverse the district court's liability determinations, we do not address the remaining issues raised on appeal.

Reversed.