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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1730**

Legacy Restaurants, Inc.,
Appellant,

vs.

Minnesota Nights, Inc.,
Respondent.

**Filed July 23, 2012
Affirmed
Schellhas, Judge**

St. Louis County District Court
File No. 69DU-CV-09-3313

Nicholas Ostapenko, Paul W. Wojciak, Johnson, Killen & Seiler, P.A., Duluth, Minnesota (for appellant)

Jerome D. Feriancek, Jr., Thibodeau, Johnson & Feriancek, PLLP, Duluth, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this commercial landlord-tenant dispute, appellant challenges the following orders of the district court: (1) denying appellant's motion to amend its complaint to add a claim of punitive damages; (2) granting respondent's motion to amend its answer to

include the affirmative defense of release and motion in limine to exclude evidence of appellant's damages, based on a sublease exculpatory clause; (3) denying appellant's motion to amend its complaint to include the claims of gross negligence and willful and wanton conduct; and (4) denying appellant's motion for reconsideration and granting summary judgment for respondent. We affirm.

FACTS

Appellant Legacy Restaurants Inc. leased space on two floors of a building in Duluth. The Duluth Athletic Club restaurant (DAC), owned and operated by Legacy, occupied the lower floor; and, commencing in March 2007, Legacy subleased the upper floor to The Tap Room, a nightclub, owned and operated by respondent Minnesota Nights. In May 2009, Legacy sued Minnesota Nights, alleging that, in September 2007, DAC sustained damage to its premises in excess of \$50,000 as a direct result of sewage effluent backup caused by The Tap Room. Legacy asserted claims of negligence, breach of lease, nuisance, and trespass. Legacy attached to its complaint the sublease agreement between it and Minnesota Nights. The sublease contains the following exculpatory clause, in relevant part:

Landlord [Legacy] and Tenant [Minnesota Nights] each hereby release the other from any and all liability or responsibility to the other . . . for any loss or damage to property caused by fire or any of the extended coverage causalities covered by the insurance maintained hereunder[.]

Minnesota Nights denied Legacy's claims.

In January 2010, the district court issued a scheduling order, setting a discovery deadline of August 1, 2010; a dispositive-hearing deadline of August 31, 2010; and a jury trial date of November 9, 2010.

Legacy moved to amend the pleadings to assert a claim for punitive damages, and, on September 17, 2010, the district court denied the motion. On October 5, Minnesota Nights filed a notice of substitution of counsel and subsequently moved for a trial continuance to allow its substitute counsel to prepare. Among other things, Minnesota Nights also moved in limine for an order excluding evidence of Legacy's alleged damages on the basis of the exculpatory clause in the sublease. Legacy moved in limine for an order excluding evidence of its receipt of an insurance payment from its insurer.¹ On November 2, the court granted Minnesota Nights's motion for a trial continuance, denied Legacy's motion to exclude evidence of the insurance payment, and denied Minnesota Nights's motion to exclude evidence of Legacy's damages. As to Minnesota Nights's motion in limine to exclude evidence of damages, the court stated:

The sublease provision unambiguously and mutually releases [Legacy] and [Minnesota Nights] from all liability for damages, including damages resulting from negligence. However, such a release is an affirmative defense under Minn. R. Civ. P. 8.03. [Minnesota Nights] waived the defense by not specifically asserting it in a responsive pleading.

On November 9, Minnesota Nights moved the district court for leave to amend its answer to include the affirmative defense of release and, on January 18, 2011, the court granted the motion. Additionally, based on the exculpatory clause in the sublease, the

¹ Legacy settled a claim for damages with its insurer for the approximate amount of \$475,000.

court vacated and reversed its previous order denying Minnesota Nights's motion in limine to exclude evidence of Legacy's damages. Thereafter, Legacy moved to amend its complaint to include claims of gross negligence and willful and wanton conduct, and the court denied Legacy's motion on February 25. Legacy then moved for reconsideration of its motion to amend its complaint to include claims of gross negligence and willful and wanton conduct, and Minnesota Nights moved for summary judgment on Legacy's negligence claim. On June 27, the district court denied Legacy's motion for reconsideration and granted summary judgment to Minnesota Nights.

This appeal by Legacy follows.

D E C I S I O N

As an initial matter, we note that the same district court judge presided over all of the proceedings in this case from the denial of Legacy's motion to amend its complaint to include a claim for punitive damages in September 2010 through the summary-judgment dismissal.

Denial of Legacy's Motion to Amend to Add Claim of Punitive Damages

Legacy argues that the district court erred by denying its motion to amend its complaint to include a claim for punitive damages.

Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. Punitive damages are an extraordinary remedy to be allowed with caution and within narrow limits. If a party seeks punitive damages, then a district court must first determine whether the evidence is sufficient to submit the issue to the jury.

J.W. ex rel. B.R.W. v. 287 Intermediate Dist., 761 N.W.2d 896, 904 (Minn. App. 2009) (quotation and citation omitted). “This court may not reverse a district court’s denial of a motion to add a claim for punitive damages absent an abuse of discretion.” *Id.* (quotation omitted).

A motion to amend for a claim of punitive damages is properly granted only when the moving party presents a prima facie case that will reasonably allow the conclusion that clear and convincing evidence will establish that the defendant deliberately disregarded the rights or safety of others. Minn. Stat. §§ 549.191, .20, subd. 1 (2010); *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007), *aff’d*, 742 N.W.2d 660 (Minn. 2007). A prima facie case is established when evidence is presented, which if unrebutted, supports a judgment. *McKenzie v. N. States Power Co.*, 440 N.W.2d 183, 184 (Minn. App. 1989). Neither negligence nor gross negligence is sufficient to satisfy the deliberate-indifference standard required for punitive damages. *See Admiral Merchs. Motor Freight, Inc. v. O’Connor & Hannan*, 494 N.W.2d 261, 268 (Minn. 1992) (stating that to properly demonstrate an entitlement to allege punitive damages, “[a] mere showing of negligence is not sufficient”); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990) (stating that employer’s conduct constituted gross negligence but not negligence rising to the level of willful indifference so as to warrant punitive-damages claim); *Utecht v. Shopko Dep’t Store*, 324 N.W.2d 652, 654 (Minn. 1982) (stating that negligent conduct was insufficient to establish punitive-damages claim). In determining whether punitive damages are allowed, a court should “focus on the wrongdoer’s conduct

rather than . . . focus on the type of damage that results from the conduct.” *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001).

Here, Legacy argued to the district court that Minnesota Nights deliberately disregarded Legacy’s rights when The Tap Room caused sewage effluent to backup into the DAC and The Tap Room’s owner, Andrew Gamache, refused to shut off its water and close after receiving multiple requests to do so. Legacy claimed that The Tap Room caused the sewer pipe to become clogged with paper towels by allowing its patrons to use paper towels in place of toilet paper after the toilet paper ran out. Legacy claimed that Gamache “knew the importance of keeping bathrooms properly supplied with toilet paper because, if there is no toilet paper, patrons will use paper towels.”

The district court determined that Legacy failed to allege a prima facie case of clear-and-convincing evidence that The Tap Room knew that its water usage was causing the sewage backup and that The Tap Room deliberately disregarded or acted with indifference toward Legacy’s rights. The court reasoned that, although Gamache’s conduct might be negligence, “there is, by no stretch of the imagination, anything willful, or malicious, or knowingly wrongful in these alleged actions. The failure to stock adequate toilet paper, if proven, is negligence, nothing more.” We agree that Legacy did not allege a prima facie case of clear-and-convincing evidence that The Tap Room knew that its patrons’ use of paper towels would create a high probability of risk of clogging the sewer pipe and causing damage to the DAC and that The Tap Room deliberately disregarded or acted with indifference towards that risk. *See J.W. ex rel. B.R.W.*, 761 N.W.2d at 904 (concluding that appellant failed to assert punitive-damages claim because

appellant presented no evidence of “specific knowledge” that an individual “would create a high probability of injury” to another person).

We therefore conclude that the district court did not abuse its discretion by denying Legacy’s motion to amend its complaint to add a claim for punitive damages.

Grant of Minnesota Nights’s Motion to Amend Answer

Legacy argues that the district court abused its discretion by granting Minnesota Nights leave to amend its answer to include the affirmative defense of release, based on the sublease exculpatory clause. After a party has served its responsive pleadings, the opposing party may amend its pleading only by the district court’s leave or by the opposing party’s consent. Minn. R. Civ. P. 15.01. “[A] motion to amend pursuant to Minn. R. Civ. P. 15.01 should be freely granted, except where to do so would result in prejudice to the other party.” *Marlow Timberland, LLC v. Cnty. of Lake*, 800 N.W.2d 637, 640 (Minn. 2011) (quotation omitted). But a district “court should deny a motion to amend a complaint where the proposed claim could not withstand summary judgment.” *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004). “In addition, the liberality to be shown in the allowance of amendments to pleadings depends in part upon the stage of the action and in a great measure upon the facts and circumstance of the particular case.” *Bebo v. Delander*, 632 N.W.2d 732, 741 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). “The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion.” *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 915 (Minn. App. 2009) (quotation omitted).

Legacy argues that the district court erred by allowing Minnesota Nights leave to amend its answer because Minnesota Nights waived the affirmative defense and could not reclaim it. Legacy cites three cases in support of its argument: *State ex rel. Johnson v. Indep. Sch. Dist. No. 810*, 260 Minn. 237, 246, 109 N.W.2d 596, 602 (1961) (involving an express voluntary waiver of a statutory right); *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 180, 84 N.W.2d 593, 602 (1957) (noting that because the parties litigated in court for more than one year, their conduct “constitutes an abandonment or waiver of the right to arbitration and a consent to the submission of the controversy to the courts”); *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 310–11, 313, 41 N.W.2d 422, 423–25 (1950) (intentional waiver of contractual right by conduct).

But Legacy’s reliance on these cases is misplaced because Minnesota Nights did not expressly, voluntarily, or intentionally waive its affirmative defense of release; it failed to plead it prior to substituting its new counsel. And unlike the affirmative defense of arbitration, the affirmative defense of release does not affect the jurisdiction of the district court. Although Minnesota Rule of Civil Procedure 8.03 lists both arbitration and release as affirmative defenses, waiver of the right to arbitration involves consideration of jurisdictional and efficiency issues, issues that are not evident in the context of a waiver of a release. *See Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 799–800 (Minn. 2004) (discussing waiver of a contractual right to arbitration when cases have been litigated in court on their merits for over one year); *Brothers Jurewicz, Inc. v. Atari, Inc.*, 296 N.W.2d 422, 428 (Minn. 1980) (“We have held consistently that a party to a contract containing an arbitration provision will be deemed to have waived any right to

arbitration if judicial proceedings based on that contract have been initiated and have not been expeditiously challenged on the grounds that disputes under the contract are to be arbitrated.”). Moreover, although “[a]n affirmative defense must be pleaded specifically and the failure to do so results in a waiver of the defense[, p]leadings may be amended to assert an affirmative defense.” *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000) (citation omitted); *see Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 532 n.3 (Minn. 1988) (noting that while an affirmative defense must be set forth in the pleadings, “it may only be waived by failure to plead it if there is no later amendment of the pleadings”).

Legacy complains that it was unfair for Minnesota Nights to raise an affirmative defense so late in the litigation when it could have asserted the affirmative defense at the beginning of the litigation. But Legacy drafted the sublease that contains the exculpatory clause, so its argument about unfairness is hollow. Furthermore, in opposing Minnesota Nights’s motion to amend its answer, Legacy made no argument that Minnesota Nights’s amendment would prejudice it; Legacy argued only that Minnesota Nights waived the defense of release. *See Marlow Timberland*, 800 N.W.2d at 640 (noting that a motion to amend “should be freely granted” except where a party would be prejudiced); *Colstad v. Levine*, 243 Minn. 279, 284–85, 67 N.W.2d 648, 653 (1954) (noting that in the absence of prejudice to the nonmoving party, district courts have “wide discretionary powers . . . for the liberal granting of an amendment to the pleadings when justice in the particular case so requires, even though the proposed amendment may change the legal theory of the action” (footnote omitted)).

Legacy also argues, citing *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414 (Minn. App. 2003), that the district court erred by granting Minnesota Nights's motions to amend its answer and to exclude evidence of Legacy's damages on the basis that the motions were "untimely disguised Motions for Summary Judgment" because the final effect of the motions was the dismissal of Legacy's case. Minnesota Nights argues that Legacy did not raise this issue in the district court. Our review of the record reveals that Legacy did raise the issue before the district court in its memorandum of law opposing Minnesota Nights's motion in limine to exclude evidence of Legacy's damages, but Legacy did not raise the issue in opposition to Minnesota Nights's motion to amend its answer. We therefore do not consider the argument in connection with the district court's grant to Minnesota Nights of leave to amend its answer. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that generally appellate courts do not consider matters not argued to and considered by the district court).

We conclude that the district court did not abuse its discretion by granting Minnesota Nights's motion to amend its answer to include the affirmative defense of release.

Grant of Minnesota Nights's Motion in Limine to Exclude Evidence of Damages

As noted above in the facts summary, before Minnesota Nights moved to amend its answer to assert the affirmative defense of release, the district court denied its motion in limine to exclude evidence of damages on the basis of the exculpatory clause in the sublease. But, after allowing Minnesota Nights to amend its answer to affirmatively allege release, the court vacated and reversed its denial of Minnesota Nights's motion in

limine. We address Legacy’s argument that the district court’s grant of Minnesota Nights’s motion in limine to exclude evidence of damages was an untimely disguised motion for summary judgment because Legacy raised this issue in its memorandum of law opposing Minnesota Nights’s motion in limine.

Citing *Hebrink*, Legacy argues that Minnesota Nights’s motion in limine to exclude evidence was a functional summary-judgment motion because the motion had the “ultimate effect” of dismissal of Legacy’s claims since an essential element of Legacy’s claims—damages—was excluded. But, in *Hebrink*, this court focused on the *nature* of the motion, not the *effect*. In *Hebrink*, the defendant–insurance company denied the plaintiff’s disability-insurance claim. 664 N.W.2d at 417. When the case was nearing trial, the defendant moved in limine to exclude evidence of the plaintiff’s total disability because, under the undisputed facts, the plaintiff could not prove that he satisfied the policy’s definition of “total disability.” *Id.* The district court granted the defendant’s motion in limine and granted summary judgment sua sponte. *Id.* On appeal, this court determined that the defendant’s motion in limine was a functional summary-judgment motion, stating:

The purpose of a motion in limine is to prevent “injection into trial of matters which are irrelevant, inadmissible and prejudicial.” *Black’s Law Dictionary* 1013 (6th ed. 1991). Here, there is no reference in either the motion in limine or the memorandum in support of the motion to any rules of evidence or other authority that would make the evidence regarding “total disability” inadmissible. Nor did Farm Bureau argue that the evidence would be irrelevant or prejudicial. Instead, the gist of Farm Bureau’s motion was that the evidence regarding “total disability” should be excluded because appellant could not prove that he met the

policy condition by relying on evidence then in the record. This was not a proper motion in limine but, rather, was tantamount to a motion for summary judgment.

Id. at 418. We concluded that “[b]ecause Farm Bureau’s motion in limine functioned as a motion for summary judgment,” it had to comply with the summary-judgment notice requirements and, because the motion was “improperly noticed,” the district court should not have considered it. *Id.* at 419.

Here, the district court granted the motion in limine to exclude damages evidence only after it granted Minnesota Nights’s motion to amend its answer to affirmatively assert release. Legacy’s release in this case, based on the exculpatory clause that it drafted and included in the sublease, rendered irrelevant the issue of damages allegedly caused by Minnesota Nights.

Although the district court did not specifically address Legacy’s argument that Minnesota Nights’s motion in limine was the functional equivalent of an untimely motion for summary judgment, we consider the court’s vacation and reversal of its order denying the motion in limine to be an implicit rejection of Legacy’s argument. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (“[O]n appeal error is never presumed.” (quotation omitted)); *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 177–78 (Minn. App. 2009) (“Appellate courts cannot assume a district court erred by failing to address a motion, and silence on a motion is therefore treated as an implicit denial of the motion.”), *review denied* (Minn. Jan. 27, 2010).

We conclude that the district court did not abuse its discretion by granting Minnesota Nights’s motion in limine to exclude evidence of damages.

Denial of Amendment to Complaint

After the district court allowed Minnesota Nights to amend its answer, Legacy moved to amend its complaint to assert claims of gross negligence and willful and wanton conduct. The district court denied Legacy's motion to amend its complaint, reasoning that the amendment would prejudice Minnesota Nights because of its need for additional discovery, the amendment therefore would require that the scheduling order be amended and Legacy failed to demonstrate good cause to modify the scheduling order as required by Minn. R. Civ. P. 16.02, and Legacy's proposed claims would not survive summary judgment. The district court also denied Legacy's motion for reconsideration, noting that Legacy drafted the sublease agreement with the exculpatory clause and "reasonably could have anticipated that the release would be pled by [Minnesota Nights]" and could have asserted its proposed new claims of gross negligence and willful and wanton conduct "in its original Complaint, but instead chose to wait until [Minnesota Nights] asserted the clause as a defense." The court concluded that Legacy's actions tended "to show [Legacy] failed to move with reasonable diligence" and that its motion therefore was untimely. The court also reiterated that Legacy's claims of gross negligence and willful and wanton conduct would not survive summary judgment.

"[P]arties seeking to amend a pleading must move with reasonable diligence." *Willmar Gas Co. v. Duininck*, 239 Minn. 173, 176, 58 N.W.2d 197, 199 (1953). Legacy argues that it had no reason to amend its complaint until Minnesota Nights raised the affirmative defense of release based on the exculpatory clause in the sublease. We reject Legacy's argument and conclude that the district court did not abuse its discretion by

denying Legacy's motion to amend its complaint. Legacy should have anticipated that the exculpatory clause that it drafted and included in the sublease would be a material issue in the litigation. In fact, in the district court's September 2010 order, when it denied Legacy's motion to amend its complaint to include a claim of punitive damages, the court advised Legacy that its complaint was based only on "traditional theories of liability," such as negligence, and, again in the court's November 2010 order initially denying Minnesota Nights's motion in limine to exclude evidence of damages, the court stated that the exculpatory clause would act as a complete bar to Legacy's recovery.

Based on the procedural history in this case and its particular facts with which the district court was acutely familiar, we will not second-guess the district court's reasoning and decision to deny Legacy's motion to amend its complaint on the eve of trial. A district court "has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of discretion." *Hempel v. Creek House Trust*, 743 N.W.2d 305, 313 (Minn. App. 2007), *review denied* (Minn. Sept. 29, 2009). We conclude that the district court did not clearly abuse its discretion by denying Legacy's motion to amend.

Grant of Summary Judgment to Minnesota Nights

"On an appeal from summary judgment we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*,

644 N.W.2d 72, 77 (Minn. 2002). This court “must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Legacy appeals from the district court’s grant of summary judgment to Minnesota Nights but, in its brief, Legacy focuses its argument on the district court’s rulings leading up to the grant of summary judgment. Legacy’s arguments seem to recognize that if this court does not reverse the district court’s rulings allowing Minnesota Nights to amend its answer to assert the affirmative defense of release, granting Minnesota Nights’s motion in limine to exclude evidence of damages, and denying Legacy’s motion to amend its complaint to assert gross negligence and willful and wanton conduct, no basis exists for this court to reverse the district court’s summary judgment to Minnesota Nights.

Because we affirm all of the district court’s orders leading up to its summary-judgment dismissal in favor of Minnesota Nights, we conclude that no genuine issue of material fact existed and that the district court did not err by granting summary judgment to Minnesota Nights.

Affirmed.