STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0744

Noel B. Skelton, et al.,
Appellants,

vs.

G121, Inc., et al.,
Respondents.

Filed April 29, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-06-11998

Michael L. Puklich, Patrick J. Neaton, Neaton & Puklich, P.L.L.P., 601 Carlson Parkway, Suite 620, Minnetonka, MN 55305 (for appellants)

Malcolm P. Terry, Messerli & Kramer, P.A., 1800 Fifth Street Towers, 150 South Fifth Street, Minneapolis, MN 55402 (for respondents)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Poritsky, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this appeal from summary judgment in a dispute arising from a sale of real estate, appellant-buyers argue that the district court erred in concluding that (a) appellants' right to cancel expired before it was exercised and (b) appellants waived their right to cancel the contract for deed. We affirm.

FACTS

On June 27, 2005, appellant Noel B. Skelton entered into a purchase agreement to purchase 13 apartment buildings from respondent Alpha Omega Properties, Inc. An addendum to the purchase agreement contained a contingency clause that required the seller to provide certain documents to the buyer within ten days of acceptance of the agreement and allowed the buyer to cancel the agreement within ten days after receiving the documents if the documents were not satisfactory to the buyer. On July 19, 2005, Skelton executed (1) a document that acknowledged receipt of many of the documents listed in the contingency clause and (2) a document that waived the "document inspection contingency" in the addendum.

On July 27, 2005, Noel Skelton and appellant Patrick Skelton (collectively buyers) executed a contract for deed with respondents G121, Inc. and R110, Inc. (collectively sellers) for the same 13 buildings that were the subject of the June 27 purchase

agreement.[1] An addendum to the contract for deed contained a contingency clause identical to the contingency clause in the purchase-agreement addendum. Following the closing on July 27, buyers took possession and began managing the buildings.

On April 26, 2006, buyers requested that sellers provide documents listed in the contingency clause of the contract-for-deed addendum. Buyers claim that in response to this request, on April 28, 2006, they received for the first time documents listed in subparagraph (i) of the contingency clause, which required sellers to provide copies of all encumbrances against the property. In a May 2, 2006 letter to sellers, buyers stated that the copies of encumbrances that they received in response to their request were not satisfactory to them, and, therefore, they were exercising their right to terminate the contract for deed. On May 20, 2006, sellers served buyers with notice of cancellation of the contact for deed due to buyers' failure to make payments.

Buyers filed a complaint seeking a declaratory judgment that they "timely exercised their right to terminate" the contract for deed, judgment against sellers for $655,487.65, and an injunction prohibiting sellers from cancelling the contract for deed. The district court granted buyers a temporary restraining order, conditioned upon buyers bringing payments on the contract up to date and keeping them current. The restraining order was set aside when buyers failed to tender the past-due payments.

[1] It is not apparent from the record why the purchase agreement and the contract for deed identify different corporations as the sellers of the buildings, but the record indicates that the same person is the principal of all three corporations identified as sellers.

Buyers then moved to amend their complaint to add claims for breach of contract, money had and received, and unjust enrichment. On December 8, 2006, the district court denied buyers' motion to amend. The district court noted that all of the claims in the proposed amended complaint were "premised on the claim that [buyers] properly terminated the contract for deed . . . after they received the items referenced in subparagraph (i) of the contingency addendum." Based on the receipt and waiver documents that Noel Skelton signed on July 19, 2005, the district court concluded that buyers' right to terminate the contract for deed "expired no later than July 29, 2005," and that buyer's attempt to terminate on May 2, 2006, was "null and void, with no force or effect." Sellers then moved for summary judgment, which the district court granted, based on its conclusion in the December 8 order that buyers' attempt to terminate the contract was ineffective. Buyers appeal the grant of summary judgment.

D E C I S I O N

On appeal from a summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court reviews de novo whether a genuine issue of material fact exists and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "On appeal, the reviewing 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). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the

nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (stating that "summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions" (emphasis omitted)).

I.

Sellers assert that because buyers did not appeal the December 8 order denying buyers' motion to amend their complaint, buyers are foreclosed from challenging the district court's conclusions in that order. Minn. R. Civ. App. P. 103.04 provides:

> On appeal from or review of an order the appellate courts may review any order affecting the order from which the appeal is taken and on appeal from a judgment may review any order involving the merits or affecting the judgment. They may review any other matter as the interests of justice may require.

Because the summary judgment order explicitly adopts the analysis and conclusions in the December 8 order regarding buyers' attempt to cancel the contract for deed, the December 8 order provides the basis for the summary judgment and, therefore, affects the judgment. Consequently, the December 8 order is within our scope of review on appeal.

Sellers also argue that buyers improperly rely on facts and documents that were not before the district court when it considered the summary judgment motion. A grant of summary judgment closes the record as to the claim or claims involved, and an

appellate court will only consider items in the record at the time summary judgment was granted. *Wall v. Fairview Hosp. & Healthcare Servs.*, 584 N.W.2d 395, 404 (Minn. 1998). The facts and documents that buyers rely on in their argument on appeal were submitted to the district court before the court granted summary judgment and are properly part of the record on appeal.

II.

The district court's grant of summary judgment was based on its conclusion that by May 2, 2006, buyers had no right under the contingency clause to terminate the contract for deed. The district court articulated two bases for this conclusion, buyers' right to terminate had expired and buyers waived their right to terminate.

The contingencies clause in the contract-for-deed addendum provided that buyers' right to terminate "shall expire 10 days after all of the foregoing items A through H have been delivered to [b]uyer." The district court concluded that because Noel Skelton acknowledged receipt of items a-h on July 19, 2005, his right to terminate the contract for deed under the contingencies clause expired no later than July 29, 2005. Citing a notation in the margin of the signed receipt that indicates that item c is "to be provide[d]," buyers assert that sellers "never provided item c to [buyers]." Buyers also assert that "the income and expense statements for 2005 were not provided by [sellers] pursuant to item g." The receipt states that Noel Skelton "acknowledge[d] that the 2005 year to date income and expenses will not be provided as agreed." Because the statements on the face of the receipt create a genuine fact issue regarding whether buyers

received all of the items listed in the contingency clause, summary judgment should not have been granted based on receipt of items a-h on July 19, 2005.

On July 19, 2005, Noel Skelton also signed a document titled "waiver notification." Based on this document, the district court concluded that Noel Skelton waived the document-inspection contingency in the contract-for-deed addendum. Buyers argue that the document was ineffective as a waiver of rights under the contract for deed because it was executed only by Noel Skelton, and not by Patrick Skelton, who was also a buyer under the contract for deed and because the waiver document was executed before the contract for deed was executed.

"Waiver has been defined as an intentional relinquishment of a known right, and while both knowledge and intention are essential elements, the knowledge may be actual or constructive and the intention can be inferred from conduct." *Stephenson v. Martin*, 259 N.W.2d 467, 470, (Minn. 1977). Although the contingencies provision in the contract-for-deed addendum is identical to the provision in the purchase-agreement addendum, it cannot be inferred from Noel Skelton's execution of the waiver document that he intended to relinquish rights that were created by the contract for deed eight days after Skelton executed the waiver.

But this court will affirm a grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996). "Ignoring a provision in a contract will constitute waiver if the party whom the provision favors continues to exercise his contract rights knowing that the condition is not met." *Patterson v. Stover*, 400 N.W.2d 398, 401 (Minn. App.

1987). "Waiver is ordinarily a question of fact … unless only one inference may be drawn from the facts. . . ." *Pollard v. Southdale Gardens of Edina Condo. Ass'n*, 698 N.W.2d 449, 453 (Minn. App. 2005).

Under the contingencies provision of the contract-for-deed addendum, sellers agreed to provide documents to buyers "within 10 days of the acceptance of this agreement." When the contract for deed was executed, buyers knew that they had not received all of the required documents. But in spite of this knowledge, buyers took possession and began managing the apartment buildings. Buyers did not request any documents until almost nine months later. The only inference that may be drawn from these facts is that buyers waived their right to receive any outstanding contingency items. Because buyers waived this right, the district court did not err in concluding that by May 2, 2006, buyers had no right under the contingencies provision to cancel the contract for deed. And because buyers' claims are all based on the incorrect premise that they canceled the contract for deed before sellers initiated their cancellation proceeding, the district court did not err in granting sellers summary judgment.

Affirmed.