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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1050**

Joe Bot, d/b/a Marshall Hotel,
Appellant,

vs.

City of Marshall, et al.,
Respondents.

**Filed February 8, 2011
Affirmed
Minge, Judge**

Lyon County District Court
File No. 42-CV-08-1153

Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellant)

Justin P. Weinberg, Matthew C. Berger, Gislason & Hunter LLP, New Ulm, Minnesota (for respondents)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

MINGE, Judge

Appellant Joe Bot, a property owner in downtown Marshall, challenges the dismissal of his damages claims against respondents City of Marshall and others, for not

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

advising him of procedural rights incident to his application for redevelopment benefits and for the manner in which his application was considered. Because we conclude the record is not adequate to establish that Bot's failure to obtain redevelopment benefits was caused by wrongful processing of his application for participation in a redevelopment plan, we affirm.

FACTS

In 2000, the City of Marshall submitted an application for a Community Development Block Grant to finance a revitalization project for its central business district. The Minnesota Department of Employment and Economic Development (DEED) establishes, finances, and oversees the block-grant program. DEED approved Marshall's application and entered into a Small Cities Development Program (SCDP) grant agreement with the city. To administer the grant, the city contracted with Southwest Minnesota Housing Partnership (SWMHP), which in turn subcontracted certain responsibilities to Western Community Action, Inc. (WCA).

The grant agreement required the city to adopt SCDP-project policies, procedures, and forms approved by DEED. To comply, the city council enacted an ordinance establishing building rehabilitation standards for the central business district and procedural guidelines for the grant program. The guidelines followed state and federal criteria for determining the eligibility of properties and rehabilitation projects for grant financing, the procedure for processing applications, and an appeal procedure for denied applications. Applications to participate in the initial round of financing for this SCDP grant were processed on a first-come, first-served basis, until the funds were exhausted.

Appellant Joe Bot attempted to qualify the Marshall Hotel property, which he owned, for participation in the initial Marshall SCDP, but applicants who filed before him depleted available financing.

In 2004, the city applied to DEED for a second SCDP grant to continue the downtown revitalization. The application identified several potential rehabilitation projects, prominently featuring Bot's Marshall Hotel. DEED approved the application, and the city entered into another SCDP grant agreement that year. The 2004 agreement paralleled the 2000 agreement in most respects, except that in the 2004 agreement the SCDP-project policies and procedures were not required to be approved by DEED. To administer the project, the city entered into a new contract with SWMHP, which again subcontracted duties to WCA. The 2004 procedural guidelines followed the 2000 guidelines in most respects.

The 2004 agreement set forth the procedure for processing applications from developers and property owners. After an application was filed and a property was determined eligible for "rehabilitation assistance," the local WCA staff was to inspect the property to determine the work required to bring the property into compliance with the rehabilitation standards. The inspector was to then prepare a formal "scope of work" report which would become the basis for the agreement between the owner and the contractor performing the work on the property. If an application was denied, the city was to send a letter of denial within 10 working days clearly outlining the reason for denial and notifying the property owner of the appeal procedure. In addition, if a property owner was "dissatisfied with the level of assistance" and the complaint could

not be resolved with the administrative staff, the applicant was to be notified of its right to appeal its dissatisfaction to the city council.

Bot applied for funds under the 2004 grant to repair the roof, fix the exterior, and rehabilitate the interior of the Marshall Hotel to establish 12 rental units. Because of the size and age of the structure, Bot's proposed project involved major renovations compared to the other SCDP projects in Marshall. Due to the extent of the work on the Marshall Hotel, Jeff Gladis, the field administrator for WCA, asked Bot to submit professionally prepared plans to insure that when finished, the Marshall Hotel would comply with applicable codes. Gladis testified that, without such plans, he did not have the expertise to evaluate a project of such complexity, properly inspect the property, prepare a scope-of-work report, or establish specifications for necessary contracts. Bot hired an architect to draw up plans, which were sent to the city building inspector. The city inspector informed Gladis of several deficiencies in the plans and warned that the project would not be issued a certificate of occupancy if the code violations were not addressed. Gladis, in turn, told Bot that the project could not proceed and the application could not be approved until revised plans were submitted showing the work needed to correct the deficiencies.

Over the next few months Gladis spoke with Bot numerous times by phone and in person and continued to reiterate that he could not proceed without city-approved building plans. Bot never furnished revised plans, and Gladis did not inspect the property or write a scope-of-work report. In this stalemated setting, Bot's application for the Marshall Hotel project was never considered complete, it was never approved, a letter of

denial was never issued, and Bot was never informed of the appeal procedure. However, Bot repeatedly complained that Gladis kept asking for building plans before he would inspect the property and proceed with processing the application. By May 2008, the funds from the grant were exhausted with other projects.

Bot ultimately sued respondents City of Marshall, SWMHP, and WCA, alleging three causes of action: (1) breach of the 2004 SCDP grant agreement by failing to process his application; (2) violation of procedural guidelines adopted by the city by not advising him of his right to appeal; and (3) negligent administration of the program. The respondents moved for summary judgment. After a hearing, the district court granted summary judgment on all claims. This appeal followed.

D E C I S I O N

We first address the issue of whether the city, SWMHP, and WCA were negligent in processing Bot's application. On appeal from summary judgment, "[w]e 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). On appeal, the evidence is viewed in the light most favorable to the party against whom summary judgment was granted. *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005). Summary judgment is granted "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 a judgment as a matter of law." Minn. R. Civ. P. 56.03.

Bot argues that the respondents had a duty to process his application, that they breached that duty by refusing to proceed without revised, detailed building plans, and that such plans were not required by the procedural guidelines. The district court found no legal duty to proceed because Bot did not provide required proof of insurance. The district court also noted that even if there was a duty, Bot's failure to provide adequate building plans was the proximate cause of any injury.

A defendant is entitled to summary judgment for a negligence claim when the record shows "a complete lack of proof on any of the four essential elements of the claim: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury." *Pond Hollow Homeowners Ass'n v. Ryland Grp., Inc.*, 779 N.W.2d 920, 923 (Minn. App. 2010) (quoting *Schafer v. JLC Food Sys., Inc.*, 695 N.W.2d 570, 573 (Minn. 2005)).

Bot argues that detailed plans were not required by the SCDP procedural guidelines and that WCA had responsibility for completing the scope-of-work report and specifications and processing the Marshall Hotel application without such plans. However, the record is clear. Gladis did not have the expertise to determine the full nature and extent of renovations needed for the Marshall Hotel to comply with the applicable codes and, thus, WCA required building plans. Gladis's determination of the scope of work was to be the basis for the agreement between the owner and the contractor to rehabilitate the property. If the contractor's work did not meet applicable codes, Bot would not be issued a certificate of occupancy for the Marshall Hotel. Without a certificate of occupancy, the hotel would not meet the objective of creating housing in a

usable building, and the project would not comply with the purpose of the SCDP grant agreement.

Here, the record indicates that over a period of months, Bot was told numerous times that he needed to correct the deficiencies in the project plans before the application could go forward. Gladis testified that “if Mr. Bot would have supplied me with [adequate] drawings that I could go off of, I would have been more than happy to do the project, because I feel it’s a very significant building in Marshall and I would have liked to have fixed it up.” Bot speculates that WCA and SWMHP were paid an adequate fee to have an in-house or consulting professional capable of preparing a scope-of-work report and that he should not have been required to pay for a professional to prepare detailed, revised plans as a part of his application. However, Bot has not raised a dispute of material fact on the question of whether WCA could reasonably proceed to consider his application without approved building plans. Aside from simple assertions, there is no *prima facie* showing that Gladis, WCA, SWMHP, or the city had the responsibility for evaluating the Marshall Hotel rehabilitation project without such plans. The only conclusion supported by the record is that Bot, by not providing proper plans, was the proximate cause of his application’s failure to move forward. Furthermore, we decline to find the respondents had a legal obligation to prepare plans. As a result, we conclude the district court did not err in dismissing his negligence claim by summary judgment.

Bot argues next that he should receive damages due to the failure of WCA, SWMHP, and the city to advise him of his procedural right to appeal. We recognize that the SCDP guidelines adopted by the city required SWMHP to notify applicants of the

appeal procedure if they were “dissatisfied with the level of assistance” and their complaint could not be resolved. We agree with Bot that given his repeated expression of dissatisfaction, SWMHP and WCA should have informed him of his right to appeal to the city council.

However, for Bot to prevail in court, he must not only show that failure to inform him of his appeal right was error, but to also establish a prima facie case of prejudice resulting from the error. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). The failure of WCA and SWMHP to notify Bot of the appeal process was not prejudicial because, as previously discussed, the lack of approved building plans precluded further consideration of his application. The possibility of any resolution of this disagreement by appeal to the Marshall City Council introduces such a high degree of speculation that the matter is not appropriate for damages relief. Lack of knowledge of the right of appeal does not eliminate the fatally speculative nature of the damages claim. Bot’s remedy was to seek a writ of mandamus to compel the city council to consider an appeal.

Bot also argues that he is a third-party beneficiary of the 2004 grant agreement and that that agreement, together with the SCDP procedural guidelines adopted by the city, created a private right of action. These arguments suffer the same fatal flaw as the negligence claim. Because Bot failed to provide adequate, revised building plans, he was the proximate cause of any injury due to Gladis’s inaction on the Marshall Hotel

application.¹ While we decline to reach the issue, we also note that even if Bot has a private right of action, it is far from clear that it could support a claim for damages.²

In sum, because there is not a dispute of material fact that Bot was the proximate cause of his application's failure to move forward, we conclude that the district court did not err in ordering summary judgment.

Affirmed.

Dated:

¹ Respondents argued that the district court held that respondents did not have a legal duty to process the application because Bot did not have insurance on the building. Certain representations by WCA that insurance was not needed until approval or contracting suggest this defense was waived. Because of a complete lack of evidence supporting the proximate-cause element of Bot's negligence claim, we decline to reach this insurance issue.

² The issue of governmental immunity was raised in the district court but was not ruled on. Because this lack of a ruling was not appealed, we do not address the issue.