STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0020

George W. Lukovsky,
Appellant,

vs.

Scott Bautch,
Defendant,

Allied Health of WI, S. C.,
Respondent.

Filed July 30, 2012
Affirmed
Larkin, Judge

St. Louis County District Court
File No. 69DU-CV-11-3549

George Lukovsky, Duluth, Minnesota (pro se appellant)

John H. Bray, Kanuit & Bray, Ltd., Hermantown, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

LARKIN, Judge

Appellant-lessor challenges the district court's dismissal of his claim against respondent-lessee, which was based on respondent's alleged oral promise to pay $16,000 to cancel the parties' lease agreement. We affirm.

FACTS

On June 13, 2003, appellant George W. Lukovsky entered into a written agreement to lease office space to respondent Allied Health of WI, S.C., for a period of three years, commencing on July 1, 2003, and terminating on July 1, 2006. Scott Bautch signed the agreement on Allied's behalf. Lukovsky signed a lease-termination agreement with Allied on February 3, 2005. As consideration for Lukovsky's agreement to terminate the lease, Allied paid Lukovsky $10,000. Later, Lukovsky sued Allied in conciliation court claiming that Allied owed him $7,500 for "[f]ailure to comply with lease agreement from July 1, 2003 through termination on July 1, 2006 for a period of three years." The conciliation court found that Lukovsky "proved his agreement to terminate the lease for $16,000, of which $10,000 has already been paid" and awarded Lukovsky $6,000. Allied removed the matter to district court.

At the ensuing trial in district court, Lukovsky testified that Allied owed him a total of $10,674.92. Lukovsky claimed that Allied breached both the lease and the lease-termination agreement. Lukovsky testified that Allied closed its clinic at the leased property on May 24, 2004, and that between the time the clinic closed and the date he signed the lease-termination agreement, he performed 82 hours of work at $50 an hour

for services assigned to Allied in the lease. Lukovsky testified that he also incurred $441 in incidental out-of-pocket expenses related to these services. Finally, he claimed that Allied owed him $133.92 for unpaid rent.

As to the lease-termination agreement, Lukovsky testified that during a conversation with Bautch in October 2004, Bautch agreed that Allied would pay Lukovsky $16,000 for early termination of the lease. Lukovsky acknowledged receipt of $10,000 from Allied as partial payment pursuant to the written lease-termination agreement, but he claimed that Allied owed him an additional $6,000 under the oral agreement. He also testified that he sold the leased property at a reduced price because he was expecting more money under the lease-termination agreement.

The district court made no findings of fact regarding Lukovsky's credibility as a witness. Instead, the district court ruled that the lease-termination agreement controlled the outcome of Lukovsky's lawsuit. The lease-termination agreement states, in part, that "[i]n partial consideration for Lessor's agreement to terminate the Lease, Lessee agrees to pay Lessor $10,000 upon execution of this Agreement." The district court concluded that the parol-evidence rule barred Lukovsky from "challenging the terms of a written agreement on the exact subject matter by way of testimony as to a purported oral agreement."

The district court ruled that all of Lukovsky's other claims under the lease are barred by a release clause in the lease-termination agreement. The district court also referred to a covenant not to sue in the lease-termination agreement and stated that "[a]rguably that clause alone, once the payment of $10,000 was received, bars this claim

all together." Finally, the district court found that Bautch was "an employee of Allied who apparently negotiated the termination of the lease," that Bautch was not properly a party, and that his name shall be stricken from the caption and proceedings. The district court entered judgment dismissing Lukovsky's claim with prejudice. Lukovsky appeals.

D E C I S I O N

"In an appeal from a bench trial, we do not reconcile conflicting evidence." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). "We give the district court's factual findings great deference and do not set them aside unless clearly erroneous." *Id.* "However, we are not bound by and need not give deference to the district court's decision on a purely legal issue." *Id.* "When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *Id.* (quotation omitted).

I.

We construe the statements in Lukovsky's appellate brief as an assertion that the district court erred by refusing to allow him to challenge the written terms of the lease-termination agreement.

> The parol evidence rule prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing. Accordingly, when parties reduce their agreement to writing, parol evidence is ordinarily

> inadmissible to vary, contradict, or alter the written agreement.
>
> However, where a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible. If it appears from the circumstances surrounding the case that the parties did not intend the agreement to be a complete integration, then parol evidence can be used to prove the existence of a separate consistent oral agreement. . . .
>
> A determination of whether the written document is a complete and accurate "integration" of the terms of the contract is not made solely by an inspection of the writing itself, important as that is, for the writing must be read in light of the situation of the parties, the subject matter and purposes of the transaction, and like attendant circumstances.
>
> . . . A merger clause establishes that the parties intended the writing to be an integration of their agreement.

Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn., 664 N.W.2d 303, 312 (Minn. 2003) (quotations and citations omitted). "[W]hether a contract is completely integrated and not subject to variance by parol evidence is . . . an issue of law for the [district] court." *Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng'g Sales, Inc.*, 436 N.W.2d 121, 123 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989).

Lukovsky's reply brief addresses application of the parol-evidence rule in this case as follows:

> In preparation of the written Termination Agreement, there are mistakes by accident which are ambiguous. The partial payment to Appellant was not the total amount promised by Respondent in Verbal Termination Agreement. The Written Termination Agreement is lacking validity and completeness with [the parties'] Verbal Termination Agreement.

Lukovsky cites no precedential legal authority and provides no legal argument in support of his assertion that the district court erred in refusing to consider parol evidence. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted). Because we discern no obvious prejudicial error in the district court's conclusion that the parol-evidence rule barred Lukovsky from presenting extrinsic evidence to contradict the parties' written lease-termination agreement, Lukovsky's assignment of error fails.

II.

Lukovsky argues that "[t]he doctrine of promissory estoppel applies in this case." "[T]he doctrine of promissory estoppel only applies where no contract exists." *Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). Because the parties do not dispute that the lease and lease-termination agreements are contracts, the doctrine of promissory estoppel does not apply.

III.

Lukovsky argues that Bautch is personally responsible for any liability arising from his negotiation of the lease-termination agreement. The district court found that Bautch was "an employee of Allied who apparently negotiated the termination of the lease." In concluding that Bautch was not properly a party, the district court implicitly determined that Bautch was not personally liable to Lukovsky. Lukovsky cites no legal authority and offers no legal argument to the contrary. This court does not presume

error on appeal. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). And because we discern no obvious prejudicial error, this assignment of error is waived. *See Modern Recycling*, 558 N.W.2d at 772.

IV.

Lukovsky argues for the first time on appeal that the lease-termination agreement does not void the lease agreement and that

> there were proceedings omitted in transcripts of the full, true and complete transcription which may likely affect the [a]ppellate process . . . Appellant was not allowed to present the facts of the case. For example, Judge Floe[r]ke stated he could read the exhibits himself. The exhibits are outlines of the facts of the case. There were other omissions and additions which were in the transcripts as well.

Generally, an appellate court will not consider matters not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Moreover, "the general rule [is] that matters such as trial procedure, evidentiary rulings and jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). For these reasons, Lukovsky's argument that the lease-termination agreement does not void the lease agreement, as well as his arguments regarding the district court's alleged exclusion of his evidence and the inadequacy of the transcript, are not properly before this court, and we do not consider them.

Affirmed.