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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1262**

Ellen Bach,
Appellant,

vs.

Life Mortgage Group, LLC,
Respondent.

**Filed May 6, 2013
Affirmed
Crippen, Judge***

Anoka County District Court
File No. 02-CV-09-6740

Kristian L. Oyen, Savage, Minnesota (for appellant)

Clarence J. Kuhn, Kuhn Law Firm, P.L.L.C., Edina, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and
Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant Ellen Bach challenges the order awarding attorney fees and costs to respondent for appellant's failure to admit six requests for admission. She challenges the district court's determination that she did not have reasonable grounds to believe she might prevail in the matter and disputes that request 11 was of substantial importance. We affirm.

FACTS

On May 28, 2008, appellant and respondent Life Mortgage Group LLC (LMG) entered into a written agreement providing that appellant would manage an LMG branch that issued home loans. Under the agreement, appellant would be paid on a commission basis and would be reimbursed for certain branch expenses, not including office-rent expenses. The agreement required that appellant submit written requests to LMG for commissions and reimbursement of expenses.

After entering into the agreement, LMG found appellant's performance unsatisfactory and discovered that she was operating or employed by at least four other businesses. LMG requested that another employee manage the branch, and appellant resigned. Appellant then filed this breach-of-contract and accounting action against LMG, claiming (1) unpaid commissions for managing the branch, (2) unpaid commissions owed to her account executives, and (3) unreimbursed expenses incurred while operating the branch. LMG answered the complaint and filed seven counterclaims.

During discovery, LMG served appellant a set of requests for admission, requesting appellant to admit she had “no evidence” that commissions were owed to appellant (#5), that any executive or employee commissions were owing (#7, #8), and that rent was due to appellant (#9). Request 11 sought appellant’s admission that “the September 2, 2008 e-mail . . . is the only communication produced by You in this dispute in which You purport to demonstrate that You actually sent an invoice to LMG.” Request 13 requested admission that after September 2, 2008, appellant had “no written evidence” of communications with any person at LMG about unpaid commissions, unpaid rent, or otherwise.

Appellant denied the requests and qualified her denials in her response to LMG’s interrogatories, stating:

5. Deny - I have a voicemail. Steve Berger’s deposition evidences that he was paid, so I should have been paid a commission as well.

. . . .

7. Deny - Brian Williams in his deposition said he was still owed commissions from LMG, though he said he was not worried about it.

8. Deny - see the response for Request for Admission No. 7, above.

9. Deny - Hagedorn’s voicemail demonstrated his understanding that in November, 2009, I was still owed rent money.

. . . .

11. Deny - The voicemail from Michael Hagedorn is also evidence of an invoice I sent to him, which was the basis for

the conversation. He would not have called me had I not sent him an invoice.

....

13. Deny - I communicated with Michael Hagedorn in November, 2009, as evidenced by his voicemail, and memorialized on the phone records I provide with the current Second Request for Production of Documents.

LMG moved for summary judgment on appellant's claims and its counterclaims for breach of contract and breach of fiduciary duties. The district court granted summary judgment to LMG on appellant's claims. The district court concluded that appellant "failed to advance any facts to demonstrate she or her employees are owed additional compensation, commissions or unreimbursed expenses resulting from her employment at LMG."

On October 12, 2011, LMG moved for attorney fees and costs pursuant to Minn. R. Civ. P. 37.03, alleging that appellant failed to admit the six requests for admission. In May 2012, after receiving a response from appellant and conducting a hearing, the district court granted the motion and awarded LMG \$10,566 in attorney fees and \$2,699.19 in costs.

D E C I S I O N

Appellant argues that the district court abused its discretion by awarding LMG attorney fees and costs because, for requests 5, 7, 8, 9, and 13, she had reasonable grounds to believe she might prevail on the matter and because request 11 was of no substantial importance.

A district court's award of attorney fees will not be reversed absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987); *Indep. Sch. Dist. No. 404 v. Castor*, 670 N.W.2d 758, 765 (Minn. App. 2003).

The Minnesota Rules of Civil Procedure provide:

If a party fails to admit . . . the truth of any matter as requested pursuant to Rule 36, and if the party requesting the admissions thereafter proves . . . the truth of any such matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees.

Minn. R. Civ. P. 37.03. But rule 37.03 contains four exceptions. *Id.* The district court shall not award attorney fees if (1) the request was objectionable, (2) the request was of no substantial importance, (3) the party had reasonable grounds to believe that he or she might prevail on the matter, or (4) there was other good reason to deny the request. *Id.*

Requests 5, 7, 8, 9, and 13

Appellant contends that, under rule 37.03's third exception, LMG is not entitled to attorney fees and costs on requests 5, 7, 8, 9, and 13.¹ Rule 37.03 addresses a party having "reasonable ground to believe that the party might prevail on the matter," not

¹ On appeal, appellant only argues that attorney fees should not be awarded for requests 5, 7, 8, 9, and 13 pursuant to rule 37.03's third exception. Although she argued to the district court that the fourth exception also applies, this argument was not briefed on appeal and was not addressed by the district court. Because issues not briefed on appeal or considered by the district court are waived, we will not address the fourth exception. See *Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) (concluding that issues not argued to and considered by the district court are waived); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (concluding that issues not briefed on appeal are waived).

reasonable ground to deny the request.² See Minn. R. Civ. P. 37.03. Because appellant did not have reasonable grounds to believe that she may prevail on the matter, the third exception does not apply.

First, appellant had no reasonable grounds to believe that she might prevail on the matter that LMG owed her unpaid commissions. To support her claim, appellant presented portions of her deposition stating she was owed commissions and a voicemail from Michael Hagedorn, an LMG employee, saying that he was determining “what [LMG] owe[d] [appellant] in payroll.” But both parties agree that appellant was required to submit written requests to receive commissions. Accordingly, appellant’s deposition testimony and the voicemail do not demonstrate that LMG owes appellant commissions. Because appellant did not present any written requests for commission to the district court, she did not have reasonable grounds to believe that she may prevail on the matter.³

Second, appellant did not have reasonable grounds to believe that she might prevail on her assertion that LMG owed her account executives commissions. Appellant argues that she would testify that she never received a portion of the account executives’

² The supreme court has affirmed a district court’s finding that a party had reasonable grounds to believe that he or she might prevail on a matter when evidence introduced at trial would have supported a finding contrary to most of the requested admissions. *Furlev Sales & Assocs., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 29 (Minn. 1982). But the supreme court did not hold that the third exception is satisfied when a party had reasonable grounds to deny a request for admission. See *id.*

³ Rule 37.03 requires a party to prove the truth of the requested admission. Although appellant presented some evidence that she was owed commissions—her deposition testimony and the voicemail—she did not argue to the district court or on appeal that LMG failed to prove the truth of the requests. This argument therefore has been waived. See *Thiele*, 425 N.W.2d at 582; *Melina*, 327 N.W.2d at 20.

commissions, demonstrating that her account executives also did not receive commissions. But at the summary-judgment hearing, appellant conceded that her employees received due compensation. And the district court found that the depositions of appellant's account executives confirmed that they were not owed commissions.⁴ Appellant did not establish that her account executives were owed commissions and, therefore, did not have reasonable grounds to believe that she might prevail on this matter.

Third, appellant did not have reasonable grounds to believe that she may prevail on her claim that she was owed unreimbursed expenses, including office-rent expenses. Appellant claims that she and Hagedorn subsequently agreed that LMG would reimburse her for rent expenses, but the written agreement of the parties specifically states that appellant is responsible for office-rent expenses, and she provided no evidence to support her claim of a contrary agreement. Appellant submitted an e-mail that contains an invoice requesting rent and other expenses, but the e-mail's source cannot be verified or substantiated because appellant's computer server crashed. Appellant did not have reasonable grounds to believe that she may prevail on this matter.

Ultimately, the district court concluded that appellant "failed to advance any facts to demonstrate she or her employees are owed additional compensation, commissions or unreimbursed expenses." Because the record confirms that appellant did not present facts

⁴ Appellant argues that Brian Williams, an account executive, testified in his deposition that LMG owed him commissions but that he was not worried about it. But the Williams deposition is not in the record on appeal. See Minn. R. Civ. P. 110.01 (defining the record on appeal); *Thiele*, 425 N.W.2d at 582-83 (stating "[a]n appellate court may not base its decision on matters outside the record on appeal").

supporting her claims, she did not have reasonable grounds to believe she would prevail on the matter. On this record, the third exception to rule 37.03 does not apply, and the district court did not abuse its discretion by awarding attorney fees related to requests 5, 7, 8, 9, and 13.

Request 11

Appellant also argues that request 11—admit that the September 2, 2008 e-mail is the only communication produced by appellant that demonstrates she sent an invoice to LMG—is of no substantial importance under the second exception to rule 37.03. But under the written agreement, appellant was required to submit invoices to LMG to receive commissions and reimbursement of expenses. These invoices support and quantify appellant’s claims, and the district court questioned the authenticity of the sole invoice that appellant presented. Evidence of additional invoices therefore is directly relevant to appellant’s claim, and the district court did not abuse its discretion by awarding LMG attorney fees and costs related to request 11.

Affirmed.