STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0877

Manley Development, Inc.,
Appellant,

vs.

Robin J. Smith, as Trustee of the Robin J. Smith Revocable Trust,
Respondent.

Filed February 24, 2014
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-12-22810

Jack E. Pierce, Sarah L. Krans, Bernick Lifson, P.A., Minneapolis, Minnesota (for appellant)

David Herr, Geoffrey P. Jarpe, Charles G. Frohman, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's summary-judgment dismissal of its claims, arguing that the district court improperly converted respondent's motion to

dismiss into a motion for summary judgment, and that appellant's claims survive under either standard. Because the district court correctly applied a summary-judgment standard and did not err in granting respondent summary judgment as to all of appellant's claims, we affirm.

FACTS

On April 6, 2012, appellant Manley Development Inc. and respondent Robin J. Smith as trustee of the Robin J. Smith Revocable Trust entered into a purchase agreement for Manley to purchase property owned by the trust in Eden Prairie for $1.3 million. The initial closing date was the earlier of August 2, 2012 or 30 days from final plat approval. The parties agreed that Manley would prepare the property for development and would then sell the property to a developer.

Also on April 6, the parties agreed to an addendum to the purchase agreement that provided for Manley to order a grading plan to determine if fill dirt, which had become available to Manley for free from a nearby development by Toll Brothers, was necessary for development of the property. If the dirt was necessary, Manley would negotiate to accept the dirt and provide a permit application for dirt placement. The dirt was worth approximately $200,000-$300,000. Manley testified that the availability of free dirt influenced the price it offered for the property.

On May 3, Gonyea Homes Inc. sent Manley a draft purchase agreement stating that it would purchase the property from Manley for $2.58 million, with closings on the lots to occur before October 31, 2012 and final closings on December 31, 2012. On May 31, Manley and Smith signed an amendment to their agreement moving the closing

date to the earlier of November 15 or 30 days from final plat approval. The amendment also granted Manley permission to deliver and spread the dirt on the property on the condition that Manley provided Smith "complete lien waivers from all contractors and subcontractors . . . prior to delivery . . . of the [d]irt."

On August 14, Smith expressed concern that if the dirt was delivered prior to closing, the bank would be unwilling to provide financing for the project because of concerns over future lien claimants. Smith stated that "since it appears you cannot get financing and I will not be moving the dirt," he planned to cancel the purchase agreement pursuant to Minn. Stat. § 559.21 (2012), which authorizes a seller to terminate a purchase agreement in the event of a default on the contract. A September 7 e-mail indicates that although the bank's concerns about the timing of the delivery of the dirt had theoretically been resolved, Manley had still failed to provide Smith with lien waivers as required by the July 17 amendment.

On November 15, Manley commenced this action, alleging (1) breach of implied covenant of good faith and fair dealing, (2) intentional interference with prospective contractual relations, (3) unjust enrichment, (4) constructive trust, (5) breach of contract, (6) anticipatory repudiation, and (7) specific performance. As of November 15, Manley had not paid the balance of the purchase price.

On November 19, Smith served notice that the contract would terminate in 30 days. On December 6, Smith moved to dismiss on all claims except specific performance, citing a portion of the purchase agreement limiting the parties' remedies for default.

At a hearing on December 18, Manley moved for a temporary restraining order staying cancellation of the purchase agreement. The parties agreed that statutory cancellation would not take effect until after the district court resolved this request. On December 20, the district court issued an order denying the temporary restraining order. Manley did not appeal this order.

Following a hearing and limited supplemental briefing, the district court filed an order treating Smith's motion to dismiss as a motion for summary judgment and granting the motion, largely on the ground that statutory cancellation had extinguished most of Manley's claims. Manley requested leave to bring a motion for reconsideration, which was denied. This appeal follows.

D E C I S I O N

I.

Whether a district court applied the correct legal standard is reviewed de novo. *Modrow v. J.P. Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). Minnesota Rule of Civil Procedure 12.02(f) provides that:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

"[A] court may consider documents referenced in a *complaint* without converting the motion to dismiss to one for summary judgment." *N. States Power Co. v. Minnesota Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). But if "the affidavits considered by

the district court were not referenced in or a part of the pleading that was the subject of the motion to dismiss," it is error for a district court not to treat the motion as one for summary judgment. *Id.* at 491.

Manley suggests that we should read rule 12.02 to allow the district court to consider only those matters "presented to and not excluded by the court" specifically in connection with the motion to dismiss. It argues that the affidavits submitted in support or opposition of the motion for a TRO should not be considered "presented to" the district court for purposes of the motion to dismiss because "a TRO neither establishes the law of the case nor constitutes an adjudication of the issues on the merits." And it concludes that because "neither party presented matters outside the pleadings on the Rule 12.02(e) motion, the [district] court erred by considering matters submitted on other motions sua sponte and treating the motion as one for summary judgment."

Appellate courts review the construction and application of the rules of civil procedure de novo. *In re Skyline Materials*, 835 N.W.2d 472, 474 (Minn. 2013). We conclude that Manley's interpretation of rule 12.02 is contrary to established caselaw concluding that consideration of *any* affidavit "not referenced in or a part of the pleading that was the subject of the motion to dismiss" converts a motion to dismiss into a motion for summary judgment. *N. States Power Co.*, 684 N.W.2d at 491. The affidavits submitted in support and opposition to the motion for a TRO were properly admitted and part of the record, but were not referenced in or a part of the pleading that was the subject to the motion to dismiss—i.e. the complaint.

Manley has presented no support for the theory that affidavits admitted into the record should be disregarded simply because they were submitted in connection with a motion for a TRO. The rule that "a TRO neither establishes the law of the case nor constitutes an adjudication of the issues on the merits" has no applicability to a district court's ability to treat affidavits submitted in connection with a TRO as part of the record or to consider those affidavits in later matters.

Next, Manley argues that the parties were not "given reasonable opportunity to present all material made pertinent" by converting the motion to dismiss to a motion for summary judgment. *See* Minn. R. Civ. P. 12.02. Manley argues that the parties were not on notice that the district court might treat Smith's motion to dismiss as a motion for summary judgment because neither party argued for a summary-judgment standard and because of the district court's statement during the January 17 hearing on the motion to dismiss that "I can't force you to do anything, but I can tell you that I won't hear summary judgment motion[s] *until there's mediation*. I can do that." (Emphasis added.) Manley also argues that the supplemental briefing ordered by the court was too limited to allow it to present all material pertinent to a summary-judgment motion.

Manley's assertions are unsupported by the record. The hearing transcripts indicate that Manley knew that in the absence of the district court granting the TRO, it was highly likely that its contract claims would be dismissed. In its memorandum of law opposing Smith's motion to dismiss, submitted after the motion for a TRO had been denied, Manley recited the rule 12.02 summary-judgment conversion standard. And

Manley had the opportunity to respond to the new legal issues raised in Smith's reply brief following the denial of the TRO and the putative cancellation of the contract.

Manley's argument that it relied on the district court's statement is similarly unconvincing. The statement was made at a hearing that took place after all briefing except the supplemental legal briefing was completed. We do not interpret this statement to imply that the district court would not hear summary-judgment motions until after mediation *and* submission of a new motion followed by additional briefing and a hearing. Rather, the district court meant what it said: that it would not hear summary-judgment motions until after mediation, which the district court was informed in a February 20, 2013 e-mail had been unsuccessful.[1]

Fatal to Manley's arguments is its failure to point to any evidence it would have produced had the district court given explicit notice that it would convert the motion to dismiss to a motion for summary judgment, or explain how that evidence would have affected the district court's ultimate conclusion. "In addition to their burden to show error, appellants have the burden on appeal to demonstrate that the trial court error caused them prejudice." *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993).

[1] Although a copy of this e-mail was not included in the district court's file, it was known to the district court and the parties. This court has the authority to correct an omission from the record. *See* Minn. R. Civ. App. P. 110.05 ("If anything material to either party is omitted from the record by error or accident or is misstated in it . . . the appellate court, on motion by a party or on its own initiative, may direct that the omission or misstatement be corrected.").

II.

We review a district court's summary-judgment decision de novo to determine "(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 view the evidence in the light most favorable to the party against whom judgment was granted. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 72 (Minn. 1997). No genuine issue of material fact exists when "the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.* at 71.

Manley argues that the district court erred when it concluded that statutory cancellation was effective, thereby terminating all of Manley's claims under the contract. It argues that even if cancellation is effective, its claim of breach of implied covenant of good faith and fair dealing survives cancellation of the contract because it is an equitable claim. And it argues that the district court erred when it granted summary judgment as to its claims of intentional interference with prospective contractual relations, unjust enrichment, and constructive trust.

Contract-based claims

If a buyer defaults on a condition in a sale of real estate, the seller may terminate the purchase agreement by serving the buyer with a statutory notice specifying the conditions in default. Minn. Stat. § 559.21, subd. 2(a). Purchase agreements may be terminated on 30 days' notice unless, before the cancellation date, the person served

complies with the conditions in default. *Id.*, subd. 4(a). A buyer who has an affirmative defense to the cancellation may seek injunctive relief before the termination date, in which it may "plead affirmatively any matter that would constitute a defense to an action to terminate the contract." Minn. Stat. § 559.211, subd. 1 (2012).

The supreme court has long recognized the finality of statutory cancellation. *See Olson v. N. Pac. Ry. Co.*, 126 Minn. 229, 231, 148 N.W. 67, 68 (1914) (holding that a contract vendee attempting to sue for damages caused by the vendor's misrepresentations "has no contract upon which to predicate damages" after cancellation of the contract for deed has occurred); *see also In re Butler*, 552 N.W.2d 226, 230 (Minn. 1996) (stating that the statutory mechanism for canceling a contract for deed is akin to a statutory strict foreclosure). After notice and cancellation, all rights between the parties under the contract are terminated. *Butler*, 552 N.W.2d at 230. Whether the district court correctly applied the cancellation statute is a question of law, which this court reviews de novo. *See Dimke v. Farr*, 802 N.W.2d 860, 862 (Minn. App. 2011), *review denied* (Minn. Nov. 22, 2011).

Manley concedes that if statutory cancellation was effective, its claims of breach of contract, anticipatory repudiation, and specific performance must be dismissed. But it argues that the district court erred as a matter of law by concluding that statutory cancellation was effective without addressing the validity of the cancellation on the merits. It also argues that material issues of fact preclude summary judgment on the question of whether cancellation was effective.

Manley relies on a series of cases where a party was allowed to bring a challenge to statutory cancellation outside of the running of the cure period, in particular *Dimke v. Farr* and the cases discussed therein. *See id.* at 864-65. Manley argues that "[h]ere, like in *Dimke*, the district court erred by granting summary judgment . . . without first determining whether the notice of declaratory cancellation was effective." Unlike in *Dimke*, however, the district court here specifically addressed the threshold issue of whether statutory cancellation was effective. The district court found that the "statutory cancellation was effective because defaults on the [purchase agreement] occurred." It found that Manley "defaulted on the [purchase agreement] by not meeting the conditions precedent relating to the delivery of [the] dirt and ultimately not securing financing for the purchase."

Manley does not dispute that it failed to provide lien waivers as required by the July 17 amendment, and failed to pay the purchase price on the date of closing. And it does not dispute that these breaches are material. Instead, it argues that "[t]here is a material factual dispute as to which party was the first to breach and whether Smith's cancellation was effective given his prior breaches of the Manley [p]urchase [a]greement." Allowing Manley to assert this defense at this time renders meaningless the requirement that a legal challenge to the termination of a contract under section 559.21 be brought "prior to the effective date of termination of the contract." *See* Minn. Stat. § 559.211, subd. 1. This court addressed this argument in *Brickner v. One Land Dev. Co.*, where we concluded that "[a]ppellants may have had a basis for avoiding cancellation based on the breaches of contract cited by them, but by failing to take action

within the 30-day cancellation period, appellants waived their right to oppose cancellation." 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008).

The cases cited by Manley simply conclude that termination via statutory cancellation does not bar a challenge to the statutory cancellation process itself, in particular the requirement that statutory cancellation is invalid in the absence of a material default. *See Vieths v. Thorp Fin. Co.*, 305 Minn. 522, 524, 232 N.W.2d 776, 778 (1975) (concluding that a genuine issue of material fact existed as to whether the sellers' actions prevented the buyers from curing the default and noting that a notice of cancellation served prior to actual default is ineffective); *Mattson v. Greifendorf*, 183 Minn. 580, 583, 237 N.W. 588, 589 (1931) (concluding that there are no grounds for cancellation where the default was trivial or nonexistent); *Coddon v. Youngkrantz*, 562 N.W.2d 39, 42-43 (Minn. App. 1997) (concluding that the delay of a single installment payment was not a default), *review denied* (Minn. July 10, 1997). None of these cases authorize raising an affirmative defense to cancellation of the contract outside of the termination period.

Manley was given the opportunity to challenge statutory cancellation of the contract, but failed to convince the district court of the merits of its arguments. And it had the opportunity to appeal this decision but failed to do so. Because statutory cancellation was effective, the claims requiring the existence of a contract were extinguished as a matter of law, as was Manley's defense to the cancellation of that contract.

Breach of the implied covenant of good faith and fair dealing

"Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (1995). An implied covenant of good faith and fair dealing "does not extend to actions beyond the scope of the underlying contract." *Id.* at 503.

Manley asserts that the district court erred in concluding that this claim was extinguished because of the effective statutory cancellation of the contract. Relying on *Coddon v. Youngkrantz*, it argues that because this is an equitable claim, it survives statutory cancellation. In *Coddon*, we concluded that "[e]ven if late payment were to constitute default under the contract, the district court's ruling that it was without jurisdiction to consider Coddon's equitable claims was error." 562 N.W.2d at 44. We stated that "[w]hile we acknowledge those cases that refused to apply equity to statutory cancellations, the circumstances of this case justify equity's 'beneficent jurisdiction.'" *Id.*

Although Manley is correct that statutory cancellation of the contract does not necessarily extinguish its equitable claims, we do not agree that the circumstances here are such that equity requires intervention by the courts. Manley's defaults are not in dispute, and its allegations of wrongdoing by Smith, as discussed below, are not supported by the record. Under these circumstances, the district court did not err in concluding that this claim should be extinguished along with the contract.

Intentional interference with prospective contractual relations

A person who "intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations." *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982) (quoting Restatement (Second) of Torts § 776B (1979)). This applies "whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." *Id.* "In an action for tortious interference with contractual relations, the plaintiff carries the burden of proving that interference was caused by the defendant." *Id.* at 632.

Manley alleges that Smith intentionally interfered with its contract to sell the property to Gonyea Homes Inc. and with its negotiations to receive the fill dirt from Toll Brothers. It alleges that Smith communicated directly with the contractor to halt delivery of the dirt and with Manley's bank to obstruct the delivery of the dirt and the sale. It alleges that Smith refused to allow delivery of the dirt, and that due to this refusal, Manley lost Gonyea as a buyer of the property.

The district court determined that "both of [Manley's] prospective contractual relations were dependent on specific conditions precedent" listed in the purchase agreement and the July 17 amendment. The district court concluded that Manley did not meet those requirements and that Manley failed to present any evidence to show that Smith actively interfered with or obstructed Manley's attempts to meet those requirements. The district court appears to have considered the information submitted in

the affidavits accompanying the memorandums in support and opposed to the motion for a TRO when making this determination. Therefore, it is appropriate to apply a summary-judgment standard when considering this claim.

The affidavits in support of Manley's motion for a TRO show that the only commitment Manley had from its bank was a July 2, 2012 letter expressing "an interest" in providing financing, provided that six conditions were met. The August 14, 2012 e-mail in which Smith states that he will not authorize moving the dirt also states that Smith's act arose directly from the concern that Manley would not be able to obtain financing if the dirt was moved prior to closing.

Manley argues that the agreement to move the dirt was not conditioned on obtaining financing or closing the project. But as Smith argues, the dirt was only valuable to the extent that it lowered development costs on the project. In the absence of financing, the dirt, at least for purposes of this contract, was worthless. And Manley's other assertion of interference—that Smith improperly contacted the bank—is unsupported by any evidence of wrongdoing. To the contrary, the June 5, 2012 e-mail states that Smith only contacted the bank on Manley's suggestion.

With respect to Manley's assertions that Smith frustrated the purpose of the agreement by withdrawing grading plans from city council consideration, the only evidence in the record is an August 8, 2012 e-mail stating that Smith only did so because Manley did not obtain Smith's approval prior to submitting the plans, and that the plans violated the terms of the addendum. And finally, the September 7, 2012 e-mail notes that

Manley had not obtained lien releases, also required by the amendment, and that the grading plans continued to violate the terms of the purchase agreement.

Even viewed in the light most favorable to the nonmoving party, this record does not support Manley's contention that its inability to obtain financing was due to an intentional act on the part of Smith. There is no evidence that the dirt was necessary in order to obtain financing or close the agreement, only that it decreased Manley's development costs. And the record is clear that the bank did not want the dirt delivered prior to closing because of concerns over future lien claimants. A party resisting summary judgment "must do more than rest on mere averments." *DLH, Inc.*, 566 N.W.2d at 71. Manley has failed to present evidence sufficient to create a genuine issue of material fact, and therefore the district court did not err in granting summary judgment on this claim. *See id.*

Unjust enrichment

"In order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit." *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). Unjust in this context means that it would be illegal, unlawful or morally wrong for the person to retain the benefit. *Id.*

The district court concluded that there was "no evidence that [Manley] made improvements to the property. The facts additionally do not show that [Smith] received an unlawful benefit." Because the district court appears to have considered the affidavits

connected to the motion for a TRO when reaching this conclusion, it was again appropriate for it to apply a summary-judgment standard to this claim. Manley alleges that it "incurred costs and fees in preparing the [p]roperty for development in an amount in excess of $50,000" and that Smith "knowingly accepted [Manley's] work and services for the improvement of the [p]roperty . . . while intending to cancel the Manley [p]urchase [a]greement and obstructing [Manley] from performing."

Manley alleged that it incurred costs, but has presented no evidence showing what benefit Smith gained. And even if we assume that Manley made some improvements that benefitted Smith, there is no evidence that any benefit received by Smith was unjust. The April 4, 2012 addendum states that Manley assumed all costs relating to "surveys, inspections or tests or for water, sewer, gas or electrical service hookup." Any benefit incurred as a result of these costs can therefore not be considered "unjust," but a contracted-for risk on the part of Manley. As discussed above, Manley has failed to present any evidence pointing to a genuine issue of material fact on whether Smith interfered with the completion of the project. The district court did not err in granting summary judgment on this claim.

Constructive trust

A constructive trust is an equitable remedy designed to prevent unjust enrichment. *Knox v. Knox*, 222 Minn. 477, 481, 25 N.W.2d 225, 228 (1946). Because the district court did not err in disposing of the unjust-enrichment claim, this claim must fail.

Affirmed.