STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0909

Tammi R. Rasmussen, et al.,
Appellants,

vs.

R & N Dvorak, Inc., et al,.
Respondents.

Filed April 29, 2008
Affirmed
Collins, Judge[*]

Scott County District Court
File No. 70-CV-06-20815

Dennis P. Moriarty, Kevin J. Wetherille, Jaspers, Moriarty & Walburg, P.A., 206 Scott Street, Shakopee, MN 55379 (for appellants)

Todd M. Johnson, Scott A. Johnson, Johnson Law Group L.L.P., 10580 Wayzata Boulevard, Suite 250, Minnetonka, MN 55305 (for respondents)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, 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

COLLINS, Judge

In this action for rescission of the purchase of a retail business, appellants-purchasers challenge the district court's summary judgment determination in favor of respondents-sellers, arguing that (1) respondents intentionally misrepresented that the business was protected by an exclusivity clause; (2) respondents intentionally misrepresented the business's finances; (3) alternatively, if not intentional misrepresentations, the statements were actionable-negligent misrepresentations; and (4) appellants did not waive their rights to challenge respondents' representations. We affirm.

FACTS

Appellants Tammi and Mark Rassmussen purchased "Say When Coffee" from respondents R & N Dvorak, Inc., Roger Dvorak, and Nancy Dvorak. The coffee shop rents its retail space in a shopping center in Shakopee. The owners of the business previous to respondents entered into lease and "lease-rider" agreements with the shopping center. The lease rider provided that:

> Landlord agrees that throughout the term of this Lease, it will not enter into a lease or another occupancy agreement with another tenant or occupant in the Shopping Center who sells gourmet coffees and/or whole bean coffees (the "Restricted Products") from its respective premises; however this restriction does not apply to the lot or land area currently occupied and/or owned by Target. . . .
>
> In the event Landlord violates this covenant, upon the opening of such offending business, Tenant shall have the right as its exclusive remedies and the full measure of

> Landlord's damages to Tenant hereunder to either reduce its Minimum Rent by fifty percent (50%) or to terminate the Lease as described herein.

The lease and lease rider were assigned to respondents upon their purchase of the coffee shop in June 2002.

In September 2004, respondents listed the business for sale. Appellants contacted respondents' sales broker in December. The broker gave appellants a one-page "confidential business profile." Relevant to this dispute, the confidential business profile stated: "The shop has *exclusive rights to sell coffee for the entire commercial development* (with the exception of Target located across the parking lot, just north of Say When Coffee)." The confidential business profile also included as a "financial overview" of the business:

> Revenue: $180,972
> Cash Flow: $40,418 (provable)
> FF&E: $75,000 included in price
> Inventory: $3,000 included in price.

And it contained this disclaimer: "All information is provided by the Seller. [The broker] does not represent or warrant this information. The receiving party shall investigate and verify all information given."

Appellants were also given a sheet of business-related ideas developed by respondents that included: "THE COFFEE SHOP CAN ONLY INCREASE BUSINESS BECAUSE: NO OTHER COFFEE SHOP CAN MOVE INTO THE WHOLE COMPLEX BECAUSE IT IS IN THE LEASE AS AN AGREEMENT (NOT EVEN STARBUCKS IN TARGET)."

On March 23, 2005, appellants signed an agreement to purchase the business for $136,000. Prior to closing, appellants received the business profit-and-loss statement showing "Total Income"[1] as $86,243.96 for 2002 and $195,324.49 for 2003. The business's S-Corporation tax returns also provided to appellants reflect gross sales as $83,109 in 2002 and $180,972 in 2003. The closing occurred on May 2, 2005, but, because the premises lease had not yet been assigned to appellants, the parties also signed an "Amendment to Agreement to Purchase" stating that the sale was contingent upon obtaining an acceptable lease assignment or agreement. On both the date of the purchase agreement and of the closing, appellants signed a "Broker Services Acknowledgement" stating that they had been advised to do "their own, independent investigation" regarding due diligence.

On May 19, 2005, respondents entered into a five-year lease-extension agreement with the landlord because their lease term was to expire in June. The lease was assigned to appellants in July. And, in September, appellants signed the "Assignment and Assumptions of Lease." Appellants allege that they did not obtain a copy of the lease and the lease rider until November 8, 2005 – six months after the closing – when the landlord sent copies to them.

In June 2006, appellants contemplated selling the coffee shop and met with an attorney. After reviewing the business documents, the attorney informed them that the lease terms did not preclude another coffee shop from moving into the shopping center.

[1] The "Total Income" appears to be gross sales; that is, total sales with no expenses deducted.

Appellants subsequently commenced this lawsuit, claiming that respondents' statements regarding the lease's exclusivity provision constituted intentional and negligent misrepresentation justifying rescission of the transaction. Appellants also claimed that respondents had intentionally misrepresented "the condition of the [business's] assets," clarifying in particular that "[i]n the financial overview section of the [broker's] 'Confidential Business Profile' document, it states a 'provable' cash flow of $40,418."[2]

Respondents moved for summary judgment, in response to which, among other things, appellants supplemented their answers to respondents' interrogatories to assert that representations in the profit-and-loss statement "provide a misleading vision of [the coffee shop's] viability and *even conflict with [respondents'] own tax returns for the years they owned the business*." Appellants argued that summary judgment was thus precluded by the showing of one or more genuine issues of material fact.

The district court granted summary judgment in favor of respondents on all claims, and this appeal followed.

D E C I S I O N

In reviewing a district court's grant of summary judgment, this court must determine whether there are any genuine issues of material fact and whether the law was applied erroneously. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment in favor of the moving party is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[2] Appellants also alleged intentional misrepresentation relating to fire damage of coffee shop equipment, not appealed here.

affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving] party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995); *see also* Minn. R. Civ. P. 56.05 (requiring that affidavits "present specific facts" because "mere averments or denials" do not preclude summary judgment). Although an appellate court reviews the evidence in a light most favorable to the non-moving party, and is prohibited from *weighing* the evidence, it is not enough for the non-moving party to show "some metaphysical doubt." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997) (holding that a court is not required to ignore its conclusion that a piece of evidence has no probative value).

I.

Appellants argue that the district court erred in determining that respondents' statement in their "confidential business profile" was not an actionable-intentional misrepresentation because (1) the statements were false; (2) it was a misrepresentation of fact, not law; and (3) whether it was reasonable or not for appellants to rely upon the statement should not have been determined at the summary-judgment stage. We disagree.

A party may be liable for intentional misrepresentation when, while knowing the statement is false or claiming it to be of his own knowledge, he makes a false representation of material, knowable, past or present fact intending the other party to act.

M.H. v. Caritas Family Services, 488 N.W.2d 282, 289 (Minn. 1992). The other party, acting in reliance on the misrepresentation, must suffer damages. *Id.*

A statement is false if it is untrue. *Black's Law Dictionary* 618 (7th ed. 1999). And "half truths may amount to fraudulent misrepresentations." *Simonsen v. BTH Properties*, 410 N.W.2d 458, 461 (Minn. App. 1987), *review denied* (Minn. Oct. 26, 1987). A party cannot "*suppress or conceal any facts within his knowledge which materially qualify those stated.*" *Id.*

Here, appellants claim that respondents had told a half truth by not specifying that the exclusive remedies for a breach of the "exclusivity" provision were to either (1) break the lease or (2) pay half-rent for the remainder of the lease term. We conclude that, because the misrepresentation was of law, it was not actionable even if appellants' argument regarding its falsity is correct.

"[A]bstract statements of law or pure legal opinions are not actionable." *Hoyt Properties, Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007). "Where a party makes representations as to the legal effect of language in a contract" it is a legal representation. *Miller v. Osterlund*, 154 Minn. 495, 496, 191 N.W. 919, 919 (1923); *see also State v. Edwards*, 178 Minn. 446, 446-50, 227 N.W. 495, 495-96 (1929) (misstating consequences of a stock sale considered to be an unactionable legal representation because "[t]he meaning of the articles [of incorporation] . . . is one of law.").

The Minnesota Supreme Court recently offered as guidance: "[O]ne who says, I think that my title to this land is good, but do not take my word for it; consult your own

lawyer, cannot be reasonably understood as asserting any fact with respect to the title" and it is, therefore, an unactionable legal representation. *Hoyt Properties*, 736 N.W.2d at 318 (quotation omitted). This is because "[a] representation of law *that is clearly a statement of opinion* does not carry an implication of fact and is not actionable." *Id.* (emphasis added). In contrast, "a mixed statement of law and fact may be actionable if it amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed and the other party would ordinarily have no knowledge of the facts." *Id.* (quotation omitted).

Respondents' statement was one of opinion, interpreting legal documents: the lease and lease rider. Respondents understood that the right to exclusivity derived from these contracts. Moreover, the confidential business profile stated that the information had not been verified by the broker and that the buyer should investigate all information given. Because respondents were representing their opinion of the lessees' rights pursuant to the relevant contracts, the statement is not actionable.

Moreover, even if the statement was false and a factual representation, appellants were not justified in relying upon it as a matter of law. A party asserting an intentional-misrepresentation claim must demonstrate that he actually and reasonably relied upon the other party's representations. *Id.* at 320-21. And "unless the falsity of the representation is known or obvious to the listener," reliance is reasonable and the listener has no obligation to investigate its accuracy. *Id.* at 321. Generally whether a party's reliance was reasonable is a fact question for the jury. *Nicollet Restoration*, 533 N.W.2d at 848. But when "the record is devoid of any facts which would support a conclusion that [the

party's] reliance was reasonable" it is proper for a court to determine the reliance was unreasonable as a matter of law. *Id.*; *see also Hoyt Properties*, 736 N.W.2d at 321 (stating "to survive a motion for summary judgment the nonmoving party must come forward with some facts supporting a conclusion of reasonable reliance"). When there is "a complete failure of proof on this issue . . . [the other party] is entitled to summary judgment as a matter of law because that failure 'renders all other facts immaterial.'" *Nicollet Restoration*, 533 N.W.2d at 848 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986)).

Here it was obvious that appellants should not rely upon this information because they admit to having two conflicting statements in their possession: (1) the confidential business statement which said that Target *could* put in a coffee shop and (2) the business-related-ideas sheet stating that Target could *not* put in a coffee shop. Appellants signed several disclosure statements acknowledging that they were responsible for their own due diligence. Because appellants should have investigated the assertion of exclusivity, their reliance on the confidential business statement was unreasonable as a matter of law.

We conclude that the district court did not err by granting summary judgment in favor of respondents on this issue.

II.

Appellants argue that the district court erred in determining that respondents' statements in their profit-and-loss document were not actionable-intentional misrepresentations because respondents' tax returns created an issue of fact as to whether the statements were false. We disagree.

Appellants financial-misrepresentation claim, as clarified in discovery, involved the statement that the business had an approximately $40,000 "provable" cash flow. The district court found this claim to be meritless. Appellants did not move to amend their complaint to include the argument presented here: that the statements regarding earnings were misrepresentations because they conflicted with the gross receipts reflected on respondents' tax returns.

The district court concluded that it was inappropriate to consider this argument, newly presented at the summary-judgment stage. Appellants first raised this discrepancy by supplementing their answers to interrogatories several weeks after respondents had moved for summary judgment. And appellants did not present their argument more thoroughly until their memorandum in opposition to summary judgment was filed shortly before the hearing date. Because appellants did not properly present this argument it was appropriate for the district court to decline to credit it.

Nonetheless, the district court noted that, even if it was appropriate to consider the new argument, it lacked merit. The court appears to have been persuaded that it was not justifiable, as a matter of law, for appellants to rely upon any misrepresentations on the profit-and-loss statements. Appellants had the business's tax returns in their possession as well as a statement of discretionary earnings which mirrored the tax returns' numbers. Additionally, the "financial overview" of the business contained in the confidential business profile included "revenue" which matched that reflected on the 2003 tax returns. Appellants were not reasonable in relying upon the different (slightly higher) figures

contained in the profit-and-loss statements. *See Nicollet Restoration*, 533 N.W.2d at 848. The district court did not err by rendering judgment in respondents' favor on this issue.

III.

Appellants argue that the district court erred in determining that respondents did not owe them a duty giving rise to negligent-misrepresentation claims. We disagree.

A party may be liable for negligent misrepresentation when, in a transaction where he has a pecuniary interest, he supplies false information to guide the other party's conduct. *Hurley v. TCF Banking & Sav.*, 414 N.W.2d 584, 586 (Minn. App. 1987). Further, it must be reasonable for the other party to rely on this "guidance." *Id.* But a claim for negligent misrepresentation cannot lie when parties negotiate at arm's length because there is no special duty owed. *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 871-73 (Minn. App. 1995), *review denied* (Minn. July 20, 1995).

Although appellants are correct that respondents had a pecuniary interest in selling their business, and that appellants may have been guided by respondents' representations, this does not diminish the significance of the arm's length nature of the transaction. The district court concluded that "[appellants] and [respondents] were adversarial parties negotiating at arm's length," noting that appellants had "submitted no evidence to the contrary." Because this court has previously held that it would be imprudent to "impose a duty in negligence on every party in all transactions," the district court correctly determined that this duty did not exist here. *Id.* at 872-83.

IV.

Appellants argue that the district court erred in determining that, by proceeding throughout the transaction without reviewing the lease, appellants had waived their right to challenge respondents' representations.[3] We disagree.

Waiver is "a voluntary relinquishment of a known right." *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 232 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. June 17, 1998). Intent to waive a right may be determined as a matter of law when a party's conduct is "so inconsistent with a purpose to stand upon one's rights as to leave no room for a reasonable inference to the contrary." *Id.* (quotation omitted).

Here, appellants signed several disclosure statements to the effect that they were responsible for conducting their own due diligence regarding their pending investment of $136,000 in the purchase of the business. Appellants did not request a copy of the lease prior to closing and they admit that respondents did nothing to prevent them from obtaining the lease. Because, for whatever reason, appellants did not insist upon completion of the assignment of the lease coincidental with the closing, the parties entered into an amended purchase agreement. Appellants admitted that they understood the addendum to provide that, although the closing would proceed, "if there was any difficulty or problems in obtaining an assignment that [appellants] find acceptable, that

[3] Appellants argue in their brief that they had requested a copy of the lease and that the district court made an "inappropriate credibility determination" by finding that it was "undisputed" that they did not request a copy of the lease before closing. But appellant Tammi Rasmussen testified in her deposition that she did not request a copy of the lease, and appellants did not present any evidence that they did request a copy. Thus the summary judgment was not flawed by a credibility determination.

[appellants] could basically back out of the purchase of the business." Although the lease was not assigned to appellants until approximately two months after the closing, even then appellants did not indicate that the lease assignment or agreement was unacceptable and they did not attempt to undo the transaction.

Furthermore, after appellants finally did receive copies of the lease and lease rider approximately six months after the closing, they only read "[p]art of it." By their own account, appellants never fully reviewed these documents before their meeting with the attorney in June 2006, more than a year after their purchase of the coffee shop was completed. Because appellants' laxity demonstrated the disregard of their rights, the district court correctly determined that waiver had occurred here as an alternative theory entitling respondents to summary judgment.

Affirmed.