STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0362

ERA Muske Real Estate Company,
Plaintiff,

vs.

Scott E. Gammon, et al.,
defendants and third party plaintiffs,
Appellants,

vs.

Carol J. Carlson,
third party defendant,
Respondent.

Filed May 6, 2008
Affirmed
Crippen, Judge[*]

Washington County District Court
File No. CX-05-6116

Patrick V. Johnson, Speeter and Johnson, 120 South Sixth Street, Suite 1515, Minneapolis, MN 55402 (for appellants)

Nathan M. Hansen, 2440 North Charles Street, Suite 224, North St. Paul, MN 55109 (for respondent)

Considered and decided by Toussaint, Chief Judge; Willis, Judge; and Crippen, Judge.

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[*] 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

CRIPPEN, Judge

Appellants Scott and Susan Gammon challenge the district court's decision that the indemnity agreements they sought to enforce against respondent Carol Carlson had no consideration, were involuntary, and were the fruits of appellants' deceit. Because the record confirms the district court's determination on the absence of consideration, we affirm.

FACTS

In March 2005, appellants signed a listing agreement with ERA Muske Real Estate Company (ERA) giving ERA the exclusive six-month right to advertise and sell their home for $249,900 and obligating appellants to pay ERA 6% of the selling price of the house, regardless of whether ERA facilitated the sale.

On April 12, 2005, respondent agreed to purchase appellants' home for $220,000, contingent upon appellants' completion of a number of repairs and upgrades to the home by April 25. On April 27, appellants met with respondent at the house and reduced the purchase price of the house to $218,500 to account for several repairs to the house that had not been completed. After changing the purchase agreement to reflect the reduction in price, appellants and respondent signed an "Addendum" which provides:

> Buyer(s) did not want to contact the listed realtor, Sandy Olson of ERA Muske Realty Company pertaining to the sale of [appellants' house].
>
> Buyer(s) requested the commissions and fees that would have been paid to the realtor be taken off the top of the

> price in the sale of the house since buyer(s) were not going thru the realtor.
>
> Buyer(s) agree to pay any and all commissions and fees to ERA Muske Realtor Company pertaining to *ERA's* sale of [appellants' house] if ERA Muske Realtor Company pursues these commissions and fees at this time and in the future. *As pertaining to Scott & Susan Gammon's contract with ERA*[.]

(Italics indicate handwritten portions of the addendum.) The parties also signed an "Amendment to Purchase Agreement" (amendment):

> Buyer(s) agree to indemnify sellers for any fees, commissions, expenses or any other monies that may be determined to be due and payable by seller to ERA Muske Real Estate pertaining to the sale of [appellants' house].
>
> Furthermore, the sellers of this property Scott and Susan Gammon agree that they will not contact or notify ERA Muske Real Estate of the sale of this property or any conditions or amendments to the signed Purchase Agreement.

The sale transaction was then closed, without the involvement of ERA.

ERA subsequently filed suit against appellants for the commission owed under the listing agreement. Appellants filed a third-party complaint against respondent seeking indemnity for the commission claim based on the addendum and amendment. At the court trial, appellant Scott Gammon and respondent each testified. Both confirmed the execution of the original and altered purchase agreement, and both said that the altered version was signed before they signed the addendum or amendment.

Respondent testified that when she signed the purchase agreement, appellants told her that they no longer had any contractual obligation to ERA. She also testified that appellants never mentioned indemnification before the day of closing, that she had not

seen the addendum or the amendment until after the purchase agreement had been changed and signed on April 27, that immediately before closing appellants told her that they would not close on the house unless and until she signed the addendum and then the amendment, and that she signed the addendum and the amendment because appellants were refusing to close on the house.

Appellant Scott Gammon testified that he showed respondent the addendum when they first signed the purchase agreement, but she refused to sign it at that time, and that he had told her that he had "fired" ERA.

Following the court trial, the district court decided that ERA was entitled to a $24,806.20 judgment against appellants for breach of contract and attorney fees, but that appellant could not recover on the indemnity promises because they were void. The district court concluded that the promises were unsupported by consideration and that respondent's signatures on the addendum and amendment were induced by fraud.

D E C I S I O N

1.

Whether a contract is supported by consideration is a question of law that we review de novo. *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999).

Contracts generally are valid only if they include consideration. *Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976). "Consideration is something of value given in return for a performance or promise of performance that is bargained for; consideration is what distinguishes a contract from a gift. A promise to do

something that one is already legally obligated to do does not constitute consideration." *Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. App. 1996) (citations omitted), *review denied* (Minn. Apr. 16, 1996).

The district court found that the purchase price of the house had been negotiated on April 12 when the purchase agreement was signed, that there were no other agreements that were part of this purchase agreement, and that on April 27 the purchase price of the home was reduced to $218,500, "since [appellants] did not have enough time to clean the Property before closing." Ultimately, the court concluded that the addendum and amendment were not part of the purchase agreement contract and concluded that respondent received no consideration in exchange for signing the amendment and addendum. The court made numerous other findings relating to respondent's defenses of fraud and duress that bear on whether respondent received consideration, namely that she only promised to indemnify appellants for any claims brought by ERA because appellants refused to close on the sale of the house unless she signed the addendum and amendment.

Appellants argue that the reduction in the purchase price of the house, from their original asking price of $249,900 to $218,500, is consideration for respondent's promises of indemnity. But the record adequately supports the district court's finding that the addendum and amendment were separate contracts from the purchase agreement. The purchase agreement, signed almost two weeks earlier, made no mention of indemnity. And the parties acknowledge that the purchase price of the house was later reduced because of appellants' failure to complete all of the specified repairs and upgrades by the time of the closing. Because the terms of the purchase agreement obligated the parties to

close the sale for $218,500, the reduced price of the home cannot also constitute consideration for respondent's later promise of indemnity. *See Sorensen v. Coast-to-Coast Stores (Cent. Org.), Inc.*, 353 N.W.2d 666, 670 (Minn. App. 1984) ("The sufficiency of consideration rests not on the amount received but upon receipt by a party of something he was not previously entitled to."), *review denied* (Minn. Nov. 7, 1984).

Appellants next argue that their promise not to notify ERA of the sale of the house is consideration for respondent's promises of indemnity. But the record shows that respondent's promises of indemnity were given in response to appellants' refusal to sell the house, in violation of the purchase agreement. The promise not to notify ERA of the sale, if it occurred, might have diminished the impact of respondent's promise of indemnity, but it does not itself constitute consideration for the promise. Respondent did not receive any value or benefit from a promise not to notify ERA of the sale.

Appellants finally argue that the sale of the house itself is consideration for respondent's promise of indemnity. But the plain language of the purchase agreement obligated appellants to sell the house to respondent for the agreed-upon price. Because appellants were already legally obligated to sell the house to respondent pursuant to the purchase agreement, it cannot also be consideration for respondent's later, independent promises of indemnity. *See Deli*, 542 N.W.2d at 656 (a promise to do something that one is already obligated to do does not constitute consideration). Furthermore, in light of respondent's testimony, credited by the district court, the promises of indemnity were given when appellants refused to go through with the closing, in violation of the purchase agreement.

We therefore affirm the district court's conclusion that respondent's promises of indemnity are without consideration. The district court also made findings regarding elements of the defenses of duress and fraud. We have no occasion to review these findings in light of our conclusion that the indemnity clauses are void for lack of consideration.

2.

Appellants also dispute the district court's pretrial decision to deny their motion for summary judgment against respondent. On appeal from denial of summary judgment, reviewing courts must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996). We view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "All doubts and factual inferences must be resolved against the moving party." *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991).

In support of their pretrial motion for summary judgment on the indemnity claim, appellants submitted to the district court appellant Scott Gammon's affidavit, the addendum, and the amendment. Appellants did not submit the purchase agreement, and the record shows that it was not admitted to evidence until trial. Respondent did not submit any affidavits or other evidence in opposition to the motion for summary judgment. The district court denied appellants' motion for summary judgment.

Appellants contend that in the absence of any evidence submitted by respondent to the district court in response to their summary judgment motion, there was no basis for

the court to decide that there was a genuine issue of material fact for trial. But appellants made an incomplete showing in support of their motion. The addendum and amendment reference the purchase agreement. Because appellants did not submit the purchase agreement, the district court was unable to determine whether appellants could establish whether the indemnity promises were part of that agreement or were independent agreements requiring a showing of separate consideration. Appellants' presentation left genuine issues of material fact to be determined. *See In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 368 (Minn. 1979) (stating that if the terms of a contract are ambiguous or are at issue, summary judgment is inappropriate). There was no error in the district court's denial of appellants' summary judgment motion.

Affirmed.