STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0433

Mary Molstad,
Respondent,

vs.

Hovstone Properties Minnesota LLC,
a Delaware corporation successor in
merger to Town & Country Homes, Inc.,
Appellant.

Filed May 6, 2008
Affirmed
Hudson, Judge

Scott County District Court
File No. 70-CV-06-26411

Thomas M. Scott, Campbell Knutson, P.A., 317 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, MN 55121 (for respondent)

Laurie J. Miller, Mark W. Vyvyan, Matthew B. Millis, Fredrikson & Byron, 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402 (for appellant)

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

* Retired judge of the district court, 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

HUDSON, Judge

In this real estate conveyance dispute, appellant-buyer Hovstone Properties challenges the district court's grant of summary judgment to respondent-seller Mary Molstad. The district court reasoned that, because buyer did not cancel the parties' purchase agreement by July 1, 2006, and did not make a $100,000 payment to seller required by the agreement, the unambiguous terms of the agreement entitled seller to the $100,000 payment. Buyer appeals arguing that the district court misread the agreement. We affirm.

FACTS

In January 2005, the parties entered a real estate purchase agreement. In relevant part, it states that: (1) buyer made an earnest-money payment and would make additional monthly earnest-money payments until closing; (2) all earnest money would be credited against the sale price and closing would occur no later than July 1, 2006; and (3) the unpaid portion of the purchase price was due at closing. The purchase agreement also stated:

> If [buyer] fails to consummate the transaction contemplated by this Agreement for any reason, except the default by Seller, Seller shall be entitled, as their exclusive remedy, to cancel and terminate this Agreement in the manner provided by applicable law, retain the Earnest Money and any other amounts deposited by [buyer] pursuant to this Agreement, and be relieved of their obligations hereunder.

An amendment of the purchase agreement not relevant here was effective January 31, 2005. The parties entered a second amendment of the purchase agreement,

effective May 3, 2006, under which closing was reset to April 1, 2007, earnest-money payments were discontinued, and a provision was added to the agreement stating:

> If [buyer] does not terminate the Purchase Agreement prior to July 1, 2006, [buyer] shall pay to Seller on such date, additional Earnest Money in the amount of One Hundred Thousand and No/100 Dollars ($100,000.00). The additional Earnest Money shall be non-refundable except in the event of a Seller default or an uncured title objection and shall be applied as a credit against the Purchase Price at the Closing.

The second amendment also stated that all other provisions of the purchase agreement remained in effect and that any conflict between the purchase agreement and its second amendment would be resolved in favor of the second amendment.

Buyer did not cancel the agreement before July 1, 2006. Nor did buyer make the $100,000 payment to seller on July 1. Seller then sued buyer seeking the $100,000 payment. After a hearing on the parties' cross-motions for summary judgment, the district court denied buyer's motion, granted seller's motion, and awarded seller a $100,000 judgment against buyer. The district court ruled that buyer did not terminate the contract by July 1, the relevant contract language was "clear," that the failure-to-consummate provision in the original purchase agreement "would only apply after the closing date which is April 1, 2007[,]" and hence that seller was entitled to the $100,000 due on July 1. The district court later amended its judgment to award seller prejudgment interest. Buyer appeals.

D E C I S I O N

On appeal from summary judgment, appellate courts address two questions: "(1) whether there are any genuine issues of material fact and (2) whether the [district]

courts erred in their application of the law." *In re Daniel*, 656 N.W.2d 543, 545 (Minn. 2003) (quoting *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990)). In doing so, an appellate court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). When the relevant facts are undisputed, a district court's application of the law to the facts results in a conclusion of law, which is reviewed de novo. *Daniel*, 656 N.W.2d at 545.

Buyer makes three arguments challenging the determination that seller is entitled to the $100,000: (1) Because the second amendment of the purchase agreement did not alter the exclusive-remedy provision in the original purchase agreement, and because the exclusive-remedy provision does not limit its applicability to a particular time, the district court erred in ruling that the exclusive-remedy provision applied only after the closing date; (2) buyer's failure to pay seller the $100,000 was a failure to consummate and triggered the exclusive-remedy provision; and (3) limiting the applicability of the exclusive-remedy provision to a post-closing failure to consummate the transaction improperly precludes the exclusive-remedy provision from applying to pre-closing failures to consummate the transaction.

Each of these arguments assumes that the exclusive-remedy provision's use of the phrase "consummate the transaction" refers to the timely completion of *every* step in the process that was supposed to culminate in the exchange of title for money at closing. Seller, however, reads the provision to refer *only* to an exchange of title for money at closing, regardless of any failures to satisfy intermediate steps. Thus, the crux of the

dispute is the meaning of "consummate" in the purchase agreement. The district court's statement that "the failure to consummate provision would only apply after the closing date" effectively adopts seller's reading of the provision.

Regarding contract construction, the supreme court has stated:

> The construction and effect of a contract is [] a question of law unless the contract is ambiguous. A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation. The determination of whether a contract is ambiguous is a question of law, but the interpretation of an ambiguous contract is a question of fact for the [fact finder]. If a contract is unambiguous, the contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.

Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346–47 (Minn. 2003) (citations and internal quotation marks omitted).

Generally, the verb "consummate" is defined as "1. To bring to completion, perfection, or fulfillment; achieve[.]" *The American Heritage Dictionary of the English Language* 286 (William Morris ed., 1980). Consistent with the idea that, generally, "consummate," by referring to completing, perfecting, or fulfilling something, refers to *achieving* a goal rather than to satisfying intermediate steps associated with achieving that goal, *Black's Law Dictionary* defines "consummate" as "1. To bring to completion; . . . 2. To achieve; to fulfill; 3. To perfect; to carry to the highest degree." *Black's Law Dictionary* 335 (Bryan A. Garner ed., 8th ed. 2004). Further, regarding "consummate," *A Dictionary of Modern Legal Usage* directs the reader: "For its sense, see *inchoate.*" *A Dictionary of Modern Legal Usage* 210 (Bryan A. Garner, 2d ed. 1995). And the entry

for "inchoate" states that it "means 'just begun, not yet fully developed.' . . . The antonym to *inchoate* is ordinarily either *consummate* <her dower becomes consummate> or *consummated* <they were consummated crimes>." *A Dictionary of Modern Legal Usage* 429–30. Finally, as seller observes, *Black's Law Dictionary* defines "closing" as "[t]he final meeting between the parties to a transaction, *at which the transaction is consummated*; esp., in real estate, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred." *Black's Law Dictionary* 272 (emphasis added).

Thus, the general and the legal senses of "consummate," as well as the real estate term-of-art sense of "closing," all refer to achieving a goal rather than to satisfying intermediate steps associated with reaching that goal. And in the real estate closing context, the goal is the exchange of title for money, a goal that, in this case, was not precluded by buyer's failure to make the $100,000 payment on July 1, 2006. Thus, the exclusive-remedy-for-failure-to-consummate provision's plain language undercuts buyer's arguments that (1) the district court erred by reading the provision to not refer to pre-closing problems; (2) applying the agreement's exclusive-remedy-for-failure-to-consummate provision only to closing-related problems runs afoul of the portion of the second amendment stating that "all other terms and provisions of the Purchase Agreement shall remain in full force and effect"; and (3) buyer's failure to make the pre-closing payment of $100,000 was a failure to "consummate" the transaction.

Nor is rejecting these arguments inconsistent with the provision's broad statement that it applies "for any reason," as is suggested by buyer. The "for-any-reason" language

appears to shift to buyer any risk associated with a failure to close the sale. Thus, regardless of why buyer might not take title at closing, seller's exclusive remedy is to cancel the purchase agreement and keep the funds paid to that date.

Buyer also argues:

> [T]o consummate the transaction, [buyer] was required to do two things: (A) pay portions of the purchase price as earnest money payments in accordance with the schedule laid out in the Purchase Agreement and the First and Second Amendments; and (B) pay the remainder of the purchase price at closing. In other words, (A) plus (B) equals (C) – consummation of the transaction. [Buyer's] failure to meet either of these requirements logically results in a failure to consummate the transaction.

There are two problems with this argument. First, the purchase agreement's exclusive-remedy-for-failure-to-consummate provision contains a non-waiver clause stating: "The waiver by Seller of any condition or the breach of any term, covenant or condition herein shall not be deemed to be a waiver of any other condition or of any subsequent breach of the same or of any other term, covenant, or condition herein contained." Thus, buyer's failure to make the $100,000 payment on July 1, 2006, could be waived by seller without seller waiving her ability to seek the entire unpaid portion of the purchase price at closing. Second, it is undisputed that buyer did not cancel the purchase agreement before July 1, 2006, that seller has not cancelled the purchase agreement, and that seller sued for the unpaid July 1 payment before the April 1, 2007 closing date.

Buyer argues that the district court's ruling produces an absurd result because "[buyer's] failure to pay the *entire* purchase price [at closing] triggers the exclusive remedy provision in the Purchase Agreement, but that [buyer's] failure to pay a *portion*

of the purchase price does not." But this analysis assumes that buyer correctly reads the "consummate the transaction" phrase to refer to both satisfying the ultimate goal *and* satisfying all of the intermediate steps associated with achieving that goal. It also ignores the fact that when seller sued, the purchase agreement had not been cancelled and the second amendment thereto, requiring the $100,000 payment, had not been satisfied. Finally, we note that ruling as buyer asks us to rule would mean that seller, in the second amendment of the purchase agreement, would have exchanged her right to periodic earnest-money payments for the $100,000 July 1, 2006 payment, but without any way to enforce that payment.

Because we reject buyer's reading of the relevant portions of the purchase agreement and its amendments, and because the purchase agreement and its amendments unambiguously entitle seller to the $100,000 July 1, 2006 payment, we affirm the district court's grant of summary judgment to seller.

Affirmed.