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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0700**

Parkos Construction Company, Inc.,
Appellant,

vs.

Anchor Distributing, Inc., d/b/a Anchor Fasteners,
Respondent.

**Filed June 3, 2008
Reversed and remanded
Johnson, Judge**

Ramsey County District Court
File No. CX-06-8538

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Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Parkos Construction Company, Inc., was hired to install cedar shingles on the roof
of the White Bear Yacht Club. Parkos Construction consulted with Anchor Distributing,
Inc., about whether staples could be used in place of nails to fasten the shingles, and

Parkos Construction eventually purchased staples from Anchor. The staples failed, which required the building to be re-roofed. Parkos Construction later made a payment to the general contractor to settle an arbitration claim.

Parkos Construction then brought this action against Anchor, alleging fraudulent misrepresentation, contribution, and indemnification. The district court granted summary judgment in favor of Anchor on all claims. We conclude, however, that genuine issues of material fact exist as to whether Parkos Construction relied on representations made by Anchor and whether Parkos Construction and Anchor had common liability toward the general contractor. Therefore, we reverse.

FACTS

In the winter of 1999, Parkos Construction was hired by the Kraus-Anderson Construction Company to install cedar shingles on the roof of the White Bear Yacht Club. Although the specifications called for six-penny galvanized nails, Parkos Construction vice president John Parkos was concerned that the nails would split the shingles during cold-weather installation.

Thus, Parkos asked Jerry Hahn, the owner of Anchor, whether it would be appropriate to substitute staples for nails. Parkos informed Hahn that he was considering submitting samples of staples to Kraus-Anderson for its approval in place of nails. Parkos testified that he gave Hahn the project specifications. Parkos also testified that Hahn provided him with samples of a certain type of staples and said, “this is what we’d use.” Parkos further testified that he relied on Hahn’s recommendation of that particular type of staples. Hahn gave Parkos a sample of those staples, Parkos Construction

submitted them to Kraus-Anderson, and they were approved. Parkos Construction later purchased the staples from Anchor and used them on the project. By 2003, however, the staples had rusted through and, thus, failed to secure the shingles adequately.

Kraus-Anderson asserted an arbitration claim against Parkos Construction for the cost of re-roofing the building. To settle the claim, Parkos Construction paid Kraus-Anderson \$119,553. Parkos Construction then commenced this action against Anchor, alleging three causes of action: fraudulent misrepresentation, contribution, and indemnification. The district court granted Anchor's motion for summary judgment on all counts. Parkos Construction appeals.

D E C I S I O N

“On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law.” *State ex rel. Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Where there are genuine issues of material fact, a reviewing court will reverse the grant of summary judgment and remand for trial. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 330 (Minn. 2004).

I. Fraudulent Misrepresentation

Parkos Construction first argues that the district court erred by concluding that, as a matter of law, Parkos Construction did not rely on Hahn's statement concerning the suitability of the staples that eventually were sold by Anchor. A claim for fraudulent misrepresentation requires proof of five elements:

(1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) *that the representation caused the other party to act in reliance thereon*; and (5) that the party suffer pecuniary damage as a result of the reliance.

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986) (emphasis added).

In *Berryman v. Riegert*, 286 Minn. 270, 175 N.W.2d 438 (1970), the supreme court stated, "If there is a misrepresentation but the purchaser, instead of relying upon it, makes an independent examination and acts upon the result thereof without regard to the misrepresentations, there is no cause of action." *Id.* at 277, 175 N.W.2d at 443 (quotation omitted). The *Berryman* court also made clear that a buyer who conducts an independent investigation nevertheless may maintain an action for fraudulent misrepresentation if the buyer *also* relies in part on the representations of the seller. *Id.* As the court stated, reliance may be found where "the representation, although not the sole cause, constituted one of several inducements and had a material influence upon the plaintiff." *Id.* (quotations omitted).

The district court based its ruling on the following excerpt from the deposition of Parkos:

Q: Is it fair to say that if Kraus-Anderson and the architect had not approved the use of staples that you wouldn't have used them?

A: Very much so.

Q: I mean, regardless of what . . . Mr. Hahn told you about these staples being able to substitute for those nails, you wouldn't have used those without approval from Kraus-Anderson, is that right?

A: Absolutely not.

This testimony establishes that Parkos Construction relied on Kraus-Anderson's approval of the staple sample. The testimony does not establish, however, that Parkos Construction did *not* rely on Hahn's recommendation of the staples that were used. There is evidence in the record to support that proposition as well. Parkos also stated in his deposition:

The reason we used [the staples] was that Jerry [Hahn] from Anchor Fastener told us these were comparable staples to the spec for the nail and we can use those in place of the nail. So that's the reason we submitted them and the reason we ended up buying them from Jerry.

Parkos reiterates this statement in an affidavit that is part of the summary judgment record. Given this evidence, a rational trier of fact could conclude that Parkos Construction relied on Hahn's representations in using the staples for the project. See *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Anchor argues that there could be no reliance with respect to the suitability of the staples for use on the roof because Anchor's only representation was that the staples were

suitable *for submitting to Kraus-Anderson for approval*. The question arises whether there is a meaningful difference. In any event, the record contains conflicting evidence on the substance of Hahn's representation. Parkos testified that he showed Hahn the project specifications and received verbal confirmation that the staples were suitable for actual use on the project. On the other hand, Hahn testified that he did not recall seeing the specifications for the shingles and fasteners. Parkos's testimony is sufficient to create a genuine issue of material fact as to whether Hahn represented that the staples would be suitable for actual use on the project.

In sum, a party may maintain an action for fraudulent misrepresentation even if it relied only in part on the opposing party's representations. The evidence in the record, viewed in the light most favorable to Parkos Construction, reflects a genuine issue of material fact as to whether Parkos Construction relied on representations made by Anchor about the suitability of the staples for the project. Thus, it was improper for the district court to grant summary judgment to Anchor on Parkos Construction's fraudulent misrepresentation claim.

II. Contribution and Indemnification

The district court granted summary judgment on both the contribution and indemnification claims. The district court held that summary judgment on those claims was appropriate because it had granted summary judgment to Anchor on the misrepresentation claim. The district court reasoned that "there was no fraudulent misrepresentation, and therefore, no common liability has been shown." Parkos

Construction argues that the district court incorrectly analyzed the claim by not asking whether both Parkos Construction and Anchor had common liability to a third party.

Contribution and indemnity are “independent causes of action; they are venerable equity actions and part of our state’s common law.” *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). “Contribution requires, first, a common liability of two or more actors to the injured party, and second, payment by one of the actors of more than its fair share of the common liability.” *Id.* “Indemnity applies when, among other situations, a party fails to discover or prevent another’s fault and, consequently, pays damages for which the other party is primarily liable. *Id.*; see *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 123, 257 N.W.2d 679, 685-86 (1977).

In *Willmar*, the supreme court noted that a plaintiff seeking contribution or indemnification must prove the common liability of the plaintiff and the defendant toward an injured third party. *Id.* In this case, the injured third party is Kraus-Anderson. Parkos Construction’s claims for indemnification and contribution may be successful if both Parkos Construction and Anchor are liable to Kraus-Anderson (or were subject to liability, prior to the settlement between Parkos Construction and Kraus-Anderson) and if Parkos Construction has paid “more than its fair share of [that] common liability.” *Id.* The district court misapplied *Willmar* by failing to focus on the question whether Parkos Construction and Anchor had liability toward Kraus-Anderson. Under *Willmar*, the proper question is whether both Anchor and Parkos Construction had liability to Kraus-Anderson and whether Parkos Construction paid more than its fair share of the damages when it paid \$119,553 to Kraus-Anderson to settle their dispute.

Anchor makes four additional arguments on this issue. First, Anchor argues that Parkos Construction's claims for contribution and indemnification cannot stand independent of the fraudulent misrepresentation claim because contribution and indemnification are remedies that are, as Anchor puts it, "derivative of contract and tort causes of action." The *Willmar* court rejected that reasoning:

[R]espondent [] argued that contribution and indemnity are not substantive rights "but only remedies to enforce some other substantive right." But on analysis this distinction collapses. A cause of action, such as for contribution-indemnity, is a "claim for relief," see Minn. R. Civ. P. 8.01, i.e., it is a remedy for violation of a legal right.

Id. at 874 n.3. The *Willmar* court further explained that "contribution-indemnity is not based on contract or tort," but on equitable considerations arising from "one party paying more than its fair share of a common liability." *Id.* at 874.

Second, Anchor argues that there could be no common liability toward Kraus-Anderson because there was no privity between Anchor and Kraus-Anderson. Again, *Willmar* squarely precludes such a conclusion. The supreme court held that a lack of privity was "immaterial" because contribution and indemnification are common-law equitable remedies that are not limited by the strictures of legal theories that require privity. *Id.* at 876-77.

Third, Anchor argues that Parkos Construction failed to plead the theories that would make Anchor liable to Kraus-Anderson. It was not necessary for Parkos Construction to plead the specific theories that would have made Anchor liable to Kraus-Anderson. Parkos Construction needed to plead only facts that would state its own

claims of contribution and indemnification. See Minn. R. Civ. P. 8.01 (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”); see also *Kelly v. Ellefson*, 712 N.W.2d 759, 767 (Minn. 2006). Parkos Construction adequately pleaded its claim because its complaint states that “Anchor and Parkos [Construction] are both responsible to Kraus-Anderson and Parkos [Construction] paid the entire settlement amount to Kraus-Anderson,” that “Parkos [Construction] paid more than its fair share of that common liability,” and that “Anchor is liable to Parkos [Construction] in contribution to pay all or a portion of the damages paid by Parkos [Construction].” In the district court, in its memorandum of law in opposition to Anchor’s motion for summary judgment, Parkos Construction set forth legal arguments supporting various theories of relief that Kraus-Anderson could have made against Anchor, namely, claims of product defects, UCC warranties, and negligence. Thus, Parkos Construction adequately pleaded its contribution and indemnification claims and effectively opposed Anchor’s summary judgment motion.

Fourth and finally, Anchor argues that the applicable statutes of limitations have run on the claims that Kraus-Anderson could have asserted against Anchor. We rely once again on *Willmar*, which specifically held that the expiration of the limitations periods applicable to the theories of common liability does not bar claims for contribution and indemnification:

[I]t makes no difference that the injured plaintiff’s claim against the party from whom contribution-indemnity is sought is barred by the statute of limitations [A] statute of limitations defense does not negate liability; it is only a procedural device that is raised after the events giving rise to

liability have occurred, and which precludes the plaintiff from collecting on that liability.

512 N.W.2d at 874-75.

Thus, there are genuine issues of material fact with respect to Parkos Construction's contribution and indemnification claims.

In sum, the district court erred by granting summary judgment. On remand, the district court should proceed to consider the remaining issues raised by the parties in their summary judgment motion papers.

Reversed and remanded.