STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1055

Horace Mann Insurance Company,
Respondent,

vs.

Karen Ferguson,
Respondent,

Epic Development X, LLC,
Appellant,

Richard Ragatz, et al.,
Defendants.

Filed June 3, 2008
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. C8-05-8654

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Harten, Judge.*

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

KALITOWSKI, Judge

On appeal in this multi-party real-estate-transfer and insurance dispute, appellant-buyer Epic Development X, LLC, argues that the district court erred in determining that (1) an assignment of the payments under the purchase agreement to respondent-seller Karen Ferguson's insurer, respondent Horace Mann Insurance Company, was valid and was not an improper "Mary Carter" agreement; (2) Ferguson and appellant did not have a settlement; (3) appellant's failure to tender the entire purchase price was not justified; (4) the doctrine of collateral estoppel did not preclude the district court from addressing Ferguson's second motion for summary judgment; and (5) Ferguson is the prevailing party in this dispute, and thus entitled to attorney fees. We affirm.

D E C I S I O N

On an appeal from summary judgment, this court asks 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 by 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

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

> either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). "[T]here is no genuine issue of material fact for trial 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." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

Appellant challenges the district court's March 7, 2007 order denying its motion to invalidate the settlement agreement between Horace Mann and Ferguson. Appellant contends that the agreement is an unenforceable "Mary Carter" agreement and that the agreement's assignment clause is invalid. We disagree.

"Settlement of disputes without litigation is highly favored, and such settlements will not be lightly set aside by the courts." *Johnson v. St. Paul Ins. Cos.*, 305 N.W.2d 571, 573 (Minn. 1981) (citation omitted). "The party seeking to avoid a settlement has the burden of showing sufficient grounds for its vacation." *Id.* Vacating a settlement agreement "rests largely within the discretion of the [district] court, and the court's action in that regard will not be reversed unless it . . . acted in such an arbitrary manner as to frustrate justice." *Id.* (quotation omitted).

The Minnesota Supreme Court has explained that a "Mary Carter" agreement is

> any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the nonagreeing defendant or defendants. Other essential provisions which earmark a Mary Carter agreement are that the fact that the agreement has been entered into and its terms are kept secret from both the nonagreeing parties and the court, that the defendants remain in the lawsuit as defendants, and that the plaintiff is guaranteed some minimum recovery.

Pac. Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 556 (Minn. 1977).

In *Pacific Indemnity*, the Minnesota Supreme Court considered a settlement agreement that had certain "Mary Carter" features because of a "limitation-of-liability provision" and a "provision for varying the amount the agreeing defendants will pay." *Id.* But the settlement agreement in *Pacific Indemnity* did not implicate "[t]he most objectionable aspects [of a "Mary Carter" agreement], secrecy and collusion . . . [u]nlike a true Mary Carter agreement, the agreement here was fully disclosed to the court and nonagreeing parties . . . ." *Id.*; *see also Johnson v. Moberg*, 334 N.W.2d 411, 415 (Minn. 1983) (requiring that "Mary Carter" agreements be promptly disclosed to the district court and other parties).

Here, we conclude that the district court correctly found that the agreement between Horace Mann and Ferguson was a loan-receipt agreement rather than a "Mary Carter" agreement. A loan-receipt agreement allows a contribution action to be brought in the name of the insured rather than in the name of the insurer, in exchange for immediate compensation to the insured. *Blair v. Espeland*, 231 Minn. 444, 449, 43

N.W.2d 274, 277 (1950). The Minnesota Supreme Court has recognized that loan receipt agreements "are a useful device in disposing of insurance disputes" and held that "[t]here is nothing improper or invalid about such a loan, and, 'so long as there was an actual transfer, the motives of the transfer [will] not be gone into.'" *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 164 (Minn. 1986) (quoting *Blair*, 231 Minn. at 449, 43 N.W.2d at 277); *see Pac. Indem. Co.*, 260 N.W.2d at 556-57 (loan-receipt agreements allow the insured, "albeit fictitiously" to remain the real party in interest).

The settlement agreement between Horace Mann and Ferguson bears the hallmarks of a loan-receipt agreement rather than a "Mary Carter" agreement. Ferguson received $389,200 from Horace Mann in exchange for releasing Horace Mann from any liability arising from the water damage to the subject property. Ferguson further agreed to allow Horace Mann "to pursue subrogation claims against [appellant] . . . to recover the monies it has loaned to Ferguson and . . . to pursue these subrogation claims against [appellant] . . . in Ferguson's name." Ferguson also agreed to assign "all rights and claims Ferguson has against [appellant] . . . independent from Horace Mann's subrogation rights under the Horace Mann Policy, and resulting from and arising out of the purchase agreement [between] Ferguson and [appellant] . . . in an amount up to the full amount of the loan . . . ." The agreement further provided that Ferguson would repay the loan only if any recovery was obtained from appellant.

The agreement at issue does not have a number of the characteristics of a "Mary Carter" agreement. The agreement does not limit the liability of Horace Mann or increase the liability of appellant. Ferguson was not guaranteed some minimum

recovery, and Horace Mann did not remain as a defendant to Ferguson's counterclaim. Moreover, although appellant argues that the agreement was kept from both [appellant] and the court, appellant was aware of the agreement at least five months before it became final.

Appellant also argues that because Ferguson had no rights to assign to Horace Mann, the assignment is void. "A valid assignment generally operates to vest in the assignee the same right, title, or interest that the assignor had in the thing assigned." *State ex rel. Southwell v. Chamberland*, 361 N.W.2d 814, 818 (Minn. 1985). In its March 7, 2007 order, the district court found that the assignment between Ferguson and Horace Mann was valid because the May 9, 2006 order allowed Ferguson to pursue her breach-of-contract claim against appellant, reduced by the mortgage-satisfaction amount. We conclude that this finding is not clearly erroneous. The May 9, 2006 order stated that "the amount of money due and owing to . . . Ferguson by [appellant] . . . under the Purchase Agreement shall be reduced by the amount Horace Mann pays over . . . pursuant to the mortgagee clause in the Horace Mann insurance policy." The settlement agreement assigned any and all rights Ferguson had against appellant to Horace Mann. Accordingly, the assignment clause validly assigned to Horace Mann the right to "the amount of money due and owing to" Ferguson by appellant.

II.

Appellant challenges the district court's March 29, 2007 order granting Ferguson's motion for summary judgment. Appellant argues that it had a valid settlement agreement

with Ferguson and that the district court erred by denying its request to enforce the agreement. We disagree.

A settlement of a lawsuit is contractual in nature, and to constitute a full and enforceable settlement, there must be a definite offer and acceptance with a meeting of the minds on the essential terms of the agreement. *Jallen v. Agre*, 264 Minn. 369, 373, 119 N.W.2d 739, 743 (1963). Generally, the existence of a contract, as well as the terms of that contract, are questions of fact to be determined by the fact-finder. *Bergstedt, Wahlberg, Berquist Assocs., Inc. v. Rothchild*, 302 Minn. 476, 480, 225 N.W.2d 261, 263 (1975). But when the relevant facts are undisputed, the existence of a contract is a question of law that we review de novo. *Triple B & G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53 (Minn. App. 1992).

Appellant refers to two July 7, 2006 e-mails as establishing the existence of a settlement agreement with Ferguson. A settlement agreement need not be in writing to be enforceable. *Jallen*, 264 Minn. at 373, 119 N.W.2d at 743. But here, the e-mail from Ferguson's attorney includes a disclaimer that reads: "Contract formation in this matter shall occur only with manually-affixed original signatures on original documents." The district court properly concluded that this disclaimer established a condition precedent that the settlement be reduced to a signed writing. *See Massee v. Gibbs*, 169 Minn. 100, 104, 210 N.W. 872, 874 (1926) ("if one expresses the intention not to be bound until the signing of a formal contract, there is no contract if that condition is not fulfilled."). Because there was never a signed writing evincing an agreement, the district court did not err in finding that there was no valid settlement between appellant and Ferguson.

Moreover, the record contains ample evidence supporting the district court's conclusion that the parties never came to "a meeting of the minds." The e-mails cited by appellant do not recite identical terms. Ferguson's attorney expressed the purchase price as "$436,000 paid to Mrs. Ferguson at closing by [appellant], *in addition to* the $10,000 in escrow," whereas appellant's attorney stated that "the $436,000 *includes* the $10,000 in escrow . . . ." And as late as October 30, 2006, the attorneys for appellant and Ferguson exchanged draft agreements. Although on July 25, 2006, the district court stated that "[p]rior to the start of trial . . . the parties reached agreement on all claims," this statement merely reflects the court's mistaken belief that a mutual understanding had been reached; it is not evidence of the parties' intentions to be bound by the agreement. Accordingly, we conclude that the district court did not err in finding that there was no enforceable settlement agreement between appellant and Ferguson.

III.

Appellant argues that it was justified in breaching its purchase agreement with Ferguson. But appellant does not challenge the May 9, 2006 order concluding that appellant "breached the Purchase Agreement on January 24, 2005 by failing to tender the purchase price to . . . Ferguson at the time of closing." And appellant presented its justification argument only in passing before the district court, arguing that the May 9, 2006 order recognized appellant's justification defense and adopted it. But contrary to appellant's assertion, that order did not adopt the defense. Rather, both the May 9, 2006 order and the order at issue on appeal are silent as to justification. Thus, to the extent that the justification issue was raised, it was implicitly rejected by the district court on May 9,

2006, and again on March 29, 2007. Moreover, appellant provides no authority in its appellate brief for its justification argument. Because appellant's justification argument was not properly raised and considered by the district court, and was not adequately briefed on appeal, we decline to address it. *See* Minn. R. Civ. App. P. 128.02, subd. 1(d) (noting that an appellant's argument must be accompanied by citations to relevant authority); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted) ("[a] reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it."); W*halen ex rel. Whalen v. Whalen*, 594 N.W.2d 277, 282 (Minn. App. 1999) (declining to address issues unsupported by citation to relevant law or legal analysis).

IV.

Appellant argues that the doctrine of collateral estoppel barred Ferguson from pursuing consequential damages from appellant. We disagree.

Collateral estoppel can bar litigation of an issue if (1) the issue is identical to one in a prior action; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior action; and (4) the estopped party had a full and fair opportunity to be heard on the issue; all four prongs must be met. *Hauschildt v. Beckingham*, 686 N.W. 2d 829, 837 (Minn. 2004). Collateral estoppel should not be rigidly or unjustly applied. *Id.* Here, collateral estoppel does not apply because the May 9, 2006 order established that appellant breached the purchase agreement, while the March 29, 2007 order determined the amount of damages resulting from that breach.

Thus, the issues litigated were not identical, and the May 9, 2006 order was not a final judgment.

Furthermore, the district court's award of consequential damages was appropriate. Recovery for a breach of contract is premised on proof that the defendant's breach caused the plaintiff's damages. *Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 105 (Minn. App. 1987). "Consequential damages are the damages which naturally flow from the breach of a contract, or may reasonably be contemplated by the parties as a probable result of a breach of the contract." *Imdieke v. Blenda-Life, Inc.*, 363 N.W.2d 121, 125 (Minn. App. 1985), *review denied* (Minn. Apr. 26, 1985).

The record indicates that subsequent to appellant's breach of the purchase agreement, Ferguson has continued to pay for mortgage interest, real-estate taxes, homeowners' insurance, and fuel to heat the home. Appellant does not dispute that these costs have been incurred. These costs flow naturally from appellant's failure to tender the purchase price of the subject property. And we reject appellant's argument that these costs arose from Horace Mann's (and not appellant's) failure to pay off the mortgage on the property. The district court's determination that Horace Mann had to pay Ferguson under the mortgagee clause does not relieve appellant from liability for consequential damages flowing from its breach of the purchase agreement. Moreover, the record indicates that appellant has yet to tender the remaining purchase price that it indisputably owes. Accordingly, we conclude that the district court's grant of consequential damages was within its discretion.

V.

Appellant argues that the district court abused its discretion in determining that Ferguson was the prevailing party, and thus entitled to attorney fees under the purchase agreement. We disagree.

We review the district court's award of attorney fees to a prevailing party for an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The Minnesota Supreme Court has held that "[t]he prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998). And when determining which party, if any, is prevailing, a district court should consider "the general result" and make an "inquiry . . . as to who has, in the view of the law, succeeded in the action." *Id.*

Here, Ferguson sought a determination that appellant breached the purchase agreement, and damages resulting therefrom. In its May 9, 2006 order, the district court determined that appellant breached its purchase agreement with Ferguson and found that Horace Mann had no breach-of-contract claim against appellant "*due to lack of privity of contract*," not based on the merits of the claim. In its March 29, 2007 order, the district court granted summary judgment in favor of Ferguson, and awarded her the remaining purchase price. Accordingly, we conclude that the district court did not abuse its discretion in determining that Ferguson was the prevailing party in this litigation.

Affirmed.