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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1582**

Superior Lake Street Properties, LLC,
Appellant,

vs.

Wayzata Bay Center, LLC,
Respondent.

**Filed August 26, 2008
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 27-CV-06-2930

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Superior Lake Street Properties, LLC, purchaser of subject property pursuant to a right-of-first-refusal agreement, challenges the district court's determination that (1) respondent-seller Wayzata Bay Center, LLC was entitled to receive \$15.25

million pursuant to the right-of-first-refusal contract and (2) respondent was not unjustly enriched. We affirm.

DECISION

I.

The predecessors-in-interest to appellant and respondent entered into a right-of-first-refusal agreement whereby appellant's predecessor gained the right to purchase the subject property "on the same terms and conditions" as a future third-party offer. Respondent subsequently entered into a purchase agreement with a third party who offered to purchase the subject property for \$15.25 million. The purchase agreement also provided that respondent would pay the third party's sales broker a 2% commission (\$305,000) at closing. After respondent notified appellant's predecessor that it had accepted the third party's offer, appellant's predecessor informed respondent that it would exercise its right of first refusal and purchase the subject property. The parties proceeded pursuant to the purchase agreement respondent had entered into with the third party. Appellant was then assigned its predecessor's right to purchase the subject property.

Before closing, appellant argued that because it was proceeding without a broker, it was entitled to deduct \$305,000 from the purchase price. Respondent refused to close unless it received the stated purchase price, \$15.25 million, from appellant. After notifying respondent that it was proceeding "under protest" appellant paid respondent \$15.25 million and the sale closed. Appellant filed a two-count complaint against

respondent alleging breach of contract and unjust enrichment. After a bench trial, the district court rejected appellant's arguments.

The parties agreed and the district court found that the term right-of-first-refusal agreement is unambiguous. Nevertheless, appellant argues that the district court erred by refusing to consider the intent of the parties in entering into the agreement. And appellant contends that when the intent is considered, it is entitled to deduct \$305,000 from the purchase price. We disagree.

The construction and effect of an unambiguous contract present questions of law, which we review de novo. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). “[T]he primary goal of contract interpretation is to determine and enforce the intent of the [contracting] parties.” *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). The general rule is that “the intent of the parties is determined from the plain language of the instrument itself.” *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). We will not rewrite, modify, or limit the effect of a contract provision by a strained construction when the contractual provision is clear and unambiguous. *Id.* And speculation as to hidden and unexpressed intent of parties to a contract cannot alter the unequivocal language of agreement. *Kuhlmann v. Educ. Publishers, Inc.*, 245 Minn. 171, 176, 71 N.W.2d 889, 893 (1955).

The right of first refusal is activated when the right holder receives notice of an offer to purchase the subject property. *See, e.g., Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 784 (Minn. 2004) (holding that a right of first refusal “ripens into an option

when the owner receives a bona fide third party offer and notifies the holder of the right”); *Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409, 411 (Minn. 1984) (distinguishing a right-of-first-refusal agreement from an option contract because the former requires a condition precedent: “the owner must have received a bona fide offer from a third party which he or she is willing to accept”). The right holder must “embrace the terms of the [third-party] offer with exactitude” because any variation constitutes a rejection of the offer and a counteroffer. *Minar v. Skoog*, 235 Minn. 262, 265-66, 50 N.W.2d 300, 302 (1951).

Here, the right-of-first-refusal agreement provided that appellant must purchase the subject property “on the same terms and conditions” as a third party’s offer. The parties agreed that the right-of-first-refusal agreement was unambiguous. And the third party’s offer unambiguously stated the purchase price of \$15.25 million as a term and condition of the purchase agreement. Thus, to purchase the subject property, appellant was required to pay this purchase price. Appellant argues that because the provision directing respondent to pay the third party’s broker a 2% commission (\$305,000) at closing was a nonessential term of the purchase agreement that, appellant should not have been bound by it. But appellant was not bound by the commission. Rather, the district court declined to alter the purchase price to reflect that the broker’s commission no longer would be paid, concluding:

While the original contract may have contemplated that [respondent] would ultimately receive \$14,945,000.00, it also contemplated that [the buyer] had an obligation to pay \$15,250,000.00. When [respondent’s] obligation to pay a broker’s fee to [the third party’s broker] was cancelled upon

[appellant's predecessor in interest's] assignment of the [r]ight of [f]irst [r]efusal to [appellant], the benefit, under the particular contract language in this case, inured to [respondent].

We note that other jurisdictions, confronted with different facts, have split regarding whether a right holder can deduct the third party's broker's commission from the purchase price. *Compare Reef v. Bernstein*, 504 N.E.2d 374, 376-77 (Mass. Ct. App. 1987) (allowing the right holder to withhold the foregone commission from the purchase price because "[t]he expectation of the parties to [the right-of-first-refusal agreement] is that the services of a broker will not be needed, and that no broker's commission will be payable") with *Fallenius v. Walker*, 787 P.2d 203, 205-06 (Colo. Ct. App. 1989) (not allowing the right holder to withhold the foregone commission because to do otherwise "would amount to permitting [the right holder] to purchase the property at a price less than that offered by [the third party], in violation of the terms of the right of first refusal"), *cert. denied*, (May 29, 1990).

On the facts here, we conclude that the district court correctly determined that for appellant to purchase the subject property "on the same terms and conditions" as the third party's offer, it was required to pay respondent the purchase price offered by the third party. Because the parties agreed that the contract language was not ambiguous, the district court did not err in refusing to look beyond the language of the agreement to ascertain the intent of the parties. *See Kuhlmann*, 245 Minn. at 176, 71 N.W.2d at 893 (explaining that courts will not engage in speculation to discover a hidden meaning allegedly contained within an unambiguous contract).

II.

Appellant argues in the alternative that respondent's receipt of the \$305,000 unjustly enriched respondent. We disagree.

We review a denial of an unjust enrichment claim for an abuse of discretion. *City of Cloquet v. Cloquet Sand & Gravel, Inc.*, 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977).

A contract claim forecloses a claim for unjust enrichment, not only if the plaintiff is successful on the contract claim but also if the plaintiff was unsuccessful, so long as a contract was formed and it governs the matter in dispute. *See Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 126 (Minn. App. 1998) ("The existence of an express contract between the parties precludes recovery under the theories of quasi-contract, unjust enrichment, or quantum meruit.") (citation omitted); *see also Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Can., Ltd.*, 552 N.W.2d 254, 268 (Minn. App. 1996) (stating that "equitable relief cannot be granted where the rights of the parties are governed by a valid contract") (quotation omitted), *review denied* (Minn. Sept. 20, 1996).

Appellant had a cause of action in contract pursuant to the right-of-first-refusal agreement. Thus, although appellant's breach-of-contract claim failed, the district court's determination that appellant was not entitled to relief under the alternative theory of unjust enrichment was not an abuse of discretion.

Affirmed.