STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2211

Daniel M. Fee, et al.,
Appellants,

vs.

George G. Stahley, et al.,
Respondents,

Edina Realty, et al.,
Respondents,

Cendant Mortgage Corporation,
Respondent,

TCF National Bank,
Respondent,

Lawyers Title Insurance Corporation,
Respondent.

Filed November 10, 2008
Affirmed
Worke, Judge

Chisago County District Court
File No. 13-CV-06-432

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

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

WORKE, Judge

On appeal from the grant of summary judgment in favor of respondents real-estate company, agent, and title-insurance company, appellants argue that genuine issues of material fact exist as to whether (1) the real-estate company and agent negligently misrepresented information about the property appellants purchased, and (2) the title-insurance company was in breach of contract by failing to indemnify and defend them on title issues. We affirm.

FACTS

In 1997, respondents George G. Stahley and Lori A. Stahley purchased property that they believed was approximately 16 acres and included lakeshore. For approximately seven years the Stahleys lived on the property, paid property taxes on 15.8 acres, and never had an issue with a neighbor claiming to own any portion of the property. When the Stahleys decided to sell their property they enlisted the help of real-estate agent respondent Paul Ross Olson. Olson walked the property with the Stahleys and instructed them to mark the corners and boundary lines with stakes. The Stahleys

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

told Olson that the property was approximately 16 acres with approximately 100 feet of lakeshore. Olson confirmed the acreage with tax records. Respondent Edina Realty and Olson prepared a MLS listing describing the property as having, among other things, 100 feet of shoreline, 16 acres of rolling land, an asphalt driveway, and a private sewer.

In September 2004, appellants Daniel M. Fee and Kerri A. Fee became interested in the Stahleys' property. Appellants visited the property a total of four times before making an offer. Appellant Kerri A. Fee (Fee) is a licensed realtor and acted as the buyer's agent. Fee "looked at everything" related to the property, including plat maps provided by the county. Fee believed that she had "checked everything out" and confirmed that the property she and her husband were buying was accurately described by Olson and the Stahleys, although she did not order a survey. On September 21, 2004, appellants and the Stahleys entered into a purchase agreement. The parties closed on October 28, 2004. The same day, appellants purchased title insurance from respondent Lawyers Title Insurance Corporation (Lawyers). The legal description provided in the policy matches the legal description provided in the warranty deed conveyed to appellants.

While appellants were still moving onto the property, a northerly neighbor, Robert Peterson, ordered a survey of his property. Appellants saw the surveyors on what they believed to be their property and asked the surveyors what they were doing on their land. A surveyor replied that he believed that it was Peterson's property. When asked what he planned to do, Peterson replied that he "will just have to let the lawyers figure it out." Appellants ordered a survey, which indicated that they did not own 16 acres with 100 feet

of lakeshore, but rather 7.1 acres and no lakeshore; that a fence line encroached onto their neighbor's property; and their septic cleanout and driveway is on Peterson's property. No court action has been taken against appellants to divest them of the land they believed they purchased, they still live in the home and use the driveway, and nobody has told them to remove any encroachments. However, appellants made a claim for indemnification, which Lawyers refused.

In 2006, appellants filed a complaint against respondents Stahleys, Edina Realty, Olson, Cendant Mortgage Corporation, TCF National Bank, and Lawyers. Appellants alleged that the Stahleys, Edina Realty, and Olson intended to deceive and induce them to purchase the property, and that Lawyers breached the title-insurance policy by refusing to insure and compensate them. In April 2007, respondents moved for summary judgment. Following a hearing, the district court ordered that the record would remain open for the Petersons' depositions. Appellants filed an offer of proof, in which they requested that the court consider the testimony of a real-estate broker who would testify regarding an agent's standard of care.

The district court granted respondents' motions for summary judgment and refused to consider appellants' offer of proof. The court concluded that appellants failed to establish their claims of intentional and negligent misrepresentation. The district court also concluded that appellants failed to establish their breach-of-contract claim against Lawyers, finding that appellants' claimed losses related to land outside of the legal description included in the policy. This appeal follows.

D E C I S I O N

In reviewing a district court's grant of summary judgment, this court must determine whether there are any genuine issues of material fact and whether the law was erroneously applied. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving] party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration v. St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995); *see also* Minn. R. Civ. P. 56.05 (requiring affidavits "present specific facts" because "mere averments or denials" do not preclude summary judgment). Although an appellate court reviews the evidence in a light most favorable to the non-moving party, and is prohibited from weighing the evidence, it is not enough for the non-moving party to show "some metaphysical doubt." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997).

Negligent Misrepresentation

Appellants first argue that the district court erred in granting summary judgment in favor of Edina Realty and Olson, contending that a genuine issue of material fact exists regarding whether Edina Realty or Olson negligently misrepresented facts. Appellants argue that Olson failed to exercise reasonable care in determining the correct boundaries

and negligently communicated that the property had an asphalt driveway, private sewer system, and lakeshore.

Negligent misrepresentation causing pecuniary loss is defined as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Smith v. Brutger Cos., 569 N.W.2d 408, 414 n.3 (Minn. 1997) (quoting Restatement (Second) of Torts § 552 (1977)). Negligent misrepresentation is limited to situations when one party is providing guidance to another; there is no cause of action when the parties are engaging in an arms-length commercial transaction. *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995).

Because neither Edina Realty nor Olson provided information "for the guidance" of appellants and this was an arms-length commercial transaction, appellants' argument fails. Edina Realty and Olson represented the sellers, the Stahleys. Appellants were represented by Fee, a licensed real estate agent, acting as the "buyer's agent." Additionally, Olson did not fail to exercise reasonable care. Appellants offer that a real estate broker would testify that Olson breached the standard of care for a real estate agent in communicating information to a buyer. But appellants presented this as an offer of proof after the summary-judgment hearing and the district court refused to accept this offer of proof. Therefore, we will not consider appellants' proffered evidence on appeal.

Moreover, appellants' argument that Olson failed to exercise reasonable care fails because an agent is not required to make an independent investigation into facts which he has no reason to doubt, unless he undertakes such an obligation. *See Hommerding v. Peterson*, 376 N.W.2d 456, 459 (Minn. App. 1985) (stating realtor has no duty to disclose material facts absent special knowledge). First, Olson had no reason to doubt what the Stahleys told him about the property. The Stahleys believed that they owned 16 acres, 100 feet of lakeshore, their driveway, and their septic system. The Stahleys moved onto the property in 1997 and used all of the property as if it belonged to them. Second, none of the Stahleys' neighbors ever claimed to own any of the property. Third, the MLS listing is based on the information the Stahleys gave to Olson and the property boundaries they marked. Lastly, Olson checked the tax records and confirmed that the Stahleys paid taxes on approximately 16 acres.

Finally, appellants cannot argue that they relied on Olson's representations or that he undertook an obligation to independently investigate facts, because Fee acted as the buyer's agent and investigated the facts. Appellants visited the property a total of four times before making an offer. Fee stated that she "looked at everything" related to the property and believed that she had "checked everything out" and confirmed that the property she and her husband were buying was accurately described by Olson and the Stahleys. Appellants did not order a survey because everything checked out. Because Fee undertook the obligation as the buyer's agent, appellants cannot now claim that Edina Realty and Olson negligently misrepresented facts. Because there are no genuine issues of material fact and the law was not erroneously applied, appellants' claim of negligent

misrepresentation fails, and the district court did not err in granting summary judgment in favor of Edina Realty and Olson.

Breach of Contract

Appellants also argue that the district court erred in granting summary judgment in favor of Lawyers, contending that a genuine issue of material fact exists as to whether Lawyers is contractually obligated to defend and indemnify them regarding certain covered risks contained in their policy. "General principles of contract interpretation apply to insurance policies." *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). "Interpretation of an insurance policy and application of the policy to the facts in a case are questions of law that we review de novo." *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). "When interpreting an insurance contract, words are to be given their natural and ordinary meaning and any ambiguity regarding coverage is construed in favor of the insured." *Id.*

Appellants claim that ten covered risks are triggered: (1) they do not have actual legal access to and from the land; (2) someone has an easement on the land; (3) someone has a right to limit their use of the land; (4) they are forced to remove existing structures on the land because the structures encroach on neighboring property; (5) their title is defective; (6) someone has an encumbrance on their title; (7) someone owns an interest in their title; (8) someone claims to have rights affecting their title arising out of fraud, duress, incompetency or incapacity; (9) their title is unmarketable; and (10) the map, if any, attached to the policy does not show the correct location of the land according to public records.

Legal Access

Appellants claim that they do not have legal access because Peterson owns the driveway. However, Peterson has not denied appellants use of the driveway and they still use it. Additionally, the property abuts a public road; thus, appellants have legal access to their property.

Easement/Limit Use of Land/Remove Structures

Appellants claim that Peterson has an unrecorded easement and because he owns the driveway, lakeshore, and septic cleanout, he could limit their use of the land and demand that they remove their fences and septic system. First, appellants provide no evidence of an easement. Second, the title insurance covers only the land legally described in the policy and the legal description does not include the driveway, the lakeshore, or the septic cleanout. Finally, nobody has demanded that appellants remove any structures. The policy covers actual loss, and because appellants have suffered no loss, their claim is currently either improper or premature.

Title

Appellants claim that their title is defective; it has an encumbrance; Peterson owns an interest in it; someone claims to have rights affecting title arising out of fraud, duress, incompetency or incapacity; and it is unmarketable. Appellants contend that they do not own the land depicted in the drawing and that Peterson has an encumbrance. The policy covers the legal description attached to the policy—the policy does not cover the loss that appellants claim because the legal description does not include the lakeshore, driveway, or septic system. Further, there is no evidence that the title appellants received

is defective. Appellants have offered no argument for their claim that someone claims to have rights affecting title arising out of fraud, duress, incompetency or incapacity. Finally, appellants claim that their title is unmarketable because they have no vehicular access and diminished value because of the loss of lakeshore. However, appellants do have legal access and diminished value does not make their title unmarketable. Appellants have no evidence that their title is unmarketable because appellants have not shown that they have been unsuccessful in attempting to sell their property.

Map

Finally, appellants argue that a map is attached to the policy showing that they own lakeshore and the driveway. But a map was not attached to the policy. Appellants suggest that a "property sketch" was attached and serves to remove standard exceptions. But the sketch provides: "This is not a survey." Additionally, the sketch states that the locations are approximate, it is only for informational purposes, it is not to be considered a liability of the company, and is limited for mortgage purposes. Moreover, the record shows that appellants did not rely on the property sketch and that they were not even sure when they first looked at it. The record shows that the sketch was created for internal use only to verify access, if the home is within lot lines, and if there is new construction. The record also shows that generally, a sketch is not attached to a policy and is given to a buyer only upon request. Thus, the sketch was never intended to be used as a map. Because there are no genuine issues of material fact and the law was not erroneously applied, the district court did not err in granting summary judgment in favor of Lawyers.

Affirmed.