STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0407

Rakesh Sharma, et al.,
Appellants,

vs.

Edina Realty, Inc., et al.,
Respondents.

Filed April 7, 2009
Affirmed
Poritsky, Judge[*]

Ramsey County District Court
File No. 62-CV-07-2777

Greg T. Kryzer, Frederic W. Knaak, Knaak & Kantrud, 3500 Willow Lake Boulevard, Suite 800, Vadnais Heights, MN 55110 (for appellants)

Stanford P. Hill, Mark R. Bradford, Bassford Remele, 33 South Sixth Street, Suite 3800, Minneapolis, MN 55402 (for respondents)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Poritsky, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

PORITSKY, Judge

The district court granted respondents' motion for summary judgment, ruling that there was no contract between the parties to convey certain land. The district court also denied appellants' motion to amend their complaint to include a claim for punitive damages. On appeal, appellants argue that the district court (1) erred by granting summary judgment, and (2) abused its discretion by denying appellants' motion to amend their complaint. We affirm.

FACTS

In October 2006, appellants Rakesh and Shailija Sharma began negotiations with Anthony and Luisa Stoss to purchase certain land owned by the Stosses, but the Stosses sold the land to third parties. In two actions, the Sharmas sued various defendants including the Stosses' agent, Edina Realty, and other parties involved in the transaction (collectively Edina), alleging tortious interference with contract, tortious interference with prospective advantage, and fraud. After a partially successful mediation failed to settle the Sharmas' claims against Edina, the district court consolidated the remaining portions of the two suits and denied the Sharmas' motion to amend their complaint to add a claim for punitive damages. Subsequently, the district court granted Edina's motion for summary judgment, ruling that the Sharmas never had a contract to purchase the land. The Sharmas appeal.

D E C I S I O N

I

The Sharmas challenge the summary judgment determination that they "never entered into a contract" with the Stosses. On appeal from summary judgment, appellate courts address whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *In re Daniel*, 656 N.W.2d 543, 545 (Minn. 2003). 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). A district court's application of the law to undisputed facts results in a conclusion of law, "which is reviewed de novo." *Daniel*, 656 N.W.2d at 545. And while the terms and existence of a contract are generally factual questions, *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992), if the record, "with respect to an essential element of the nonmoving party's case" would not "permit reasonable persons to draw different conclusions," summary judgment is proper, *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Also, "[e]very contract" for the sale of land "shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the . . . sale is to be made, or by the party's lawful agent thereunto authorized in writing." Minn. Stat. § 513.05 (2008).

The Sharmas make three arguments in support of their contention that the district court erred in granting summary judgment in favor of Edina. First, they argue that they and the Stosses entered into a contract on November 3, 2006, when, they assert, the parties had a meeting of the minds regarding price. Whether a meeting of the minds exists is an objective question, and "it is the expressed mutual assent [of the parties to the

purported agreement] rather than actual mutual assent which is the essential element." *N. Star Ctr., Inc. v. Sibley Bowl, Inc.*, 295 Minn. 424, 426, 205 N.W.2d 331, 332 (1973); *see New England Mut. Life Ins. Co. v. Mannheimer Realty Co.*, 188 Minn. 511, 513, 247 N.W. 803, 804 (1933) (making a similar statement). Thus, absent an objective manifestation of a meeting of the minds, there is no contract.

Before November 3, 2006, the parties had been involved in a series of offers and counteroffers. A number of the Sharmas' counteroffers were made by the Sharmas' agent using the same document, a "Counter Offer Addendum" form that was originally dated October 14, 2006. Instead of using a new form with each subsequent offer or counteroffer, the Sharmas' agent simply crossed out the Sharmas' prior offer or counteroffer on the October 14 form and wrote, by hand, a new offer or counteroffer on the same form. On November 3, 2006, the Sharmas' agent sent to the Stosses the November 3 version of the October 14 form, proposing a purchase price of $550,000 and requiring the Stosses to pay $5,000 in closing costs. While this previously used document had, in its previous uses, been signed by the Sharmas' agent, the November 3 version of the document was not signed by either the agent or the Sharmas themselves. The Stosses, however, signed the document that day. They then returned it to the Sharmas. The Stosses' agent later informed the Sharmas' agent that the Stosses were waiting for a copy—signed by the Sharmas—of the form. On November 11, 2006, the Sharmas produced a copy of the form that they had purportedly signed the previous day. By November 11, however, the Stosses had revoked their offer and had agreed to sell the land to third parties.

On appeal, the Sharmas assert that on November 3, when the Stosses signed the November 3 version of the October 14 "Counteroffer Addendum," there was "a meeting of the minds" on all the terms of the sale. But even if there was a subjective meeting of the minds, what was missing on November 3 was the expressed mutual assent by the Sharmas personally, and for this reason, the Stosses repeatedly informed the Sharmas' agent that the Stosses were waiting for a copy of the "Counteroffer Addendum" signed by the Sharmas.

Moreover, it is undisputed that on and after November 3, the parties were still trying to identify an acceptable closing date. As a result, there was no agreement on the date of conveyance. Thus, even if, as of November 3, there were sufficient agreement regarding price, there was no meeting of the minds, much less an objective manifestation of a meeting of the minds, regarding the date by which the terms necessary to convey the property were to be satisfied. *See generally Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 122 (Minn. 1981) (stating, on appeal from a declaratory judgment regarding the effect of a real estate purchase agreement, that for the agreement to be enforceable, "[it] must be sufficiently certain and complete in its essential terms that ordinarily specific performance will lie"). We conclude that the district court was correct in ruling that as of November 3, there was no contract between the Sharmas and the Stosses.

The Sharmas' second argument is that events on November 10, 2006 "clearly reflect[] an issue of factual dispute" about whether a packet of documents conveyed to Edina by the Sharmas' agent that day included a version of the Stosses' November 3, 2006 offer signed by the Sharmas. The Sharmas, as the parties opposing summary

judgment, cannot establish genuine issues of material fact "by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). To support their assertion that a fact question exists, the Sharmas cite deposition testimony of their agent, who testified that he "took the originals [of various documents], earnest money check with all the addendums and [he] delivered personally to [Edina]." The general and conclusory nature of the agent's statement that he took to Edina's office "all" of the addendums, purportedly including the one with the Sharmas' signatures, is highlighted by the confused nature of this record regarding the negotiation process. The record includes, among other things, a significant number of addendums, including one addendum containing multiple offers by the Sharmas where the number of offers on the addendum exceeds the number of signatures by the Sharmas' agent. Further, the Sharmas' argument fails to address the specific deposition testimony of the Stosses' agent, in which he states that he "know[s]" that the packet delivered on November 10, 2006, did not include an addendum with the Sharmas' signatures. Nor do the Sharmas address the admission by their agent that he did not get a receipt for the documents that he delivered to Edina on November 10, 2006. On this record, and because *Dyrdahl* prohibits creating fact questions by relying on unsubstantiated conclusory statements and merely metaphysical doubts, we will not reverse the district court's decision to grant summary judgment.

The Sharmas' third argument is that Rakesh Sharma's signature on the earnest money check, which was in fact delivered in the November 10 packet of documents, is

sufficient to act as a signature on the offer. The earnest money check is dated October 10. The Sharmas ask us to accept that a check written on October 10 constitutes a signature on, and hence approval of, an agreement purportedly entered into on November 3. We will not do so. Further, while the check bears the signature of Rakesh Sharma, it lacks a signature of Shailija Sharma. A check written by Rakesh Sharma a month before any agreement was purportedly entered into does not constitute approval by Shailija Sharma of such agreement. Finally, the proposed purchase agreement, signed by the Sharmas on October 10, states:

> RECEIVED OF [THE SHARMAS] the sum of THREE THOUSAND Dollars ($3,000.00) by [check] as earnest money to be deposited upon acceptance of Purchase Agreement by all parties, on or before the third business day after acceptance, in the trust account of listing broker, unless otherwise agreed to in writing, but to be returned to Buyer if Purchase Agreement is not accepted by Seller.

We note that, under the provision quoted above, it is the deposit of the check into the account of the listing broker that could be used to show an agreement. For this argument to succeed there must be some showing that the check was deposited into the trust account of the listing broker. But the record before this court does not address whether the earnest money check was ever deposited. Hence, this argument fails, and we conclude that Rakesh Sharma's signature on the earnest money check is not sufficient to act as the signature of both Rakesh and Shailija Sharma on the offer.

II

The Sharmas challenge the denial of their motion to amend their complaint to seek punitive damages. *See Metag v. K-Mart Corp.*, 385 N.W.2d 864, 866-67 (Minn. App.

1986) (reviewing, on appeal from a final judgment, a pretrial order denying a motion to amend a complaint to include a claim for punitive damages), *review denied* (Minn. June 23, 1986).

An initial complaint cannot include a claim for punitive damages, but a complaint may be amended to seek punitive damages, and a motion to amend must both allege a legal basis for punitive damages under Minn. Stat. § 549.20 (2008) or other law, and include at least one affidavit alleging a factual basis for the claimed punitive damages. Minn. Stat. § 549.191 (2008). If a prima facie case in support of the motion exists, the district court "shall grant" the motion to amend. *Id.* A prima facie case is one in which the allegations, if true, would entitle the alleging party to relief. *See V.H. v. Estate of Birnbaum*, 543 N.W.2d 649, 653 (Minn. 1996). "[M]ere" negligence is an insufficient basis for punitive damages; "instead, the conduct must be done with malicious, willful, or reckless disregard for the rights of others." *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 268 (Minn. 1992). Whether to allow a complaint to be amended to include a claim for punitive damages is discretionary with the district court, and an appellate court will reverse only if there is a clear abuse of that discretion. *Utecht v. Shopko Department Store*, 324 N.W.2d 652, 654 (Minn. 1982); *LaSalle Cartage Co. v. Johnson Bros. Wholesale Liquor Co.*, 302 Minn. 351, 357-58, 225 N.W.2d 233, 238 (1974).

Prima Facie Case

Punitive damages are allowed "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn.

Stat. § 549.20, subd. 1. Clear and convincing evidence is "more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). And in the context of punitive damages, a defendant acts with deliberate disregard for the rights or safety of others if the defendant "has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others" and deliberately acts with conscious disregard or indifference to the high degree of probability of injury to the rights or safety of others. Minn. Stat. § 549.20, subd. 1.

Here, the district court ruled that the Sharmas failed to make a prima facie showing of punitive damages from Edina because, when the Stosses and Edina received the offer from the third parties, the Stosses sought advice from their agent who sought advice from Edina's legal department and then acted consistently with that advice. The district court concluded that "there are no facts in this case to support willful, malicious or intentional misconduct by any of these Defendants."

The Sharmas argue to this court that clear and convincing evidence

> shows that Edina was involved in the negotiation, [and] that they knew there was a purchase agreement on November 3, 2006 when the Stosses signed the agreement. Edina also knew that [the Sharmas] were inspecting the property and moving forward on their purchase agreement. The earnest money check was delivered after the inspection contingency on November 10, 2006. The record, however, clearly shows that on November 10, 2006 [Edina] and their agents purposefully and maliciously sought to interfere with [the Sharmas'] contract. Edina on November 10, 2006 received another purchase agreement for the same property, had their clients accept it, and in return received a higher commission on the increased selling price.

We reject this argument for four reasons.

First, it assumes both that a contract existed on November 3, 2006, and that Edina knew one existed as of that date. We have concluded that no contract existed.

Second, we have determined that the delivery of the earnest money check did not constitute the Sharmas' expressed assent to the agreement. Third, the Sharmas did not make a showing sufficient to defeat summary judgment on the issue of whether the packet contained a copy of the Stosses' November 3, 2006 offer containing the signatures of the Sharmas. Finally, the Sharmas' assertions that "[Edina] and their agents purposefully and maliciously sought to interfere with [the Sharmas'] contract" and that Edina and the Stosses accepted the other, higher, offer ignores the fact that Edina and the Stosses acted in compliance with legal advice regarding whether a contract existed. Good faith can be a defense to liability for punitive damages, and acting consistently with the advice of counsel can, under appropriate circumstances, show good faith. *See Gits v. Norwest Bank Minneapolis*, 390 N.W.2d 835, 838 (Minn. App. 1986) (addressing good faith as a defense to a claim for punitive damages and a purported reliance on counsel's advice). Thus, even if there were a contract, Edina and the Stosses had grounds for a good-faith belief to proceed as if a contract did not exist.

Separate Torts

Noting that, under *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001), punitive damages are not limited to personal injury cases and that they made several tort claims, the Sharmas assert that they "are entitled to a recovery for punitive damages." This

argument, however, adds nothing to the Sharmas' failure to make a prima facie showing of the existence of clear and convincing evidence that Edina deliberately disregarded their rights.

Affirmed.

_____

Judge Bertrand Poritsky