STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1093

2446 University Avenue, LLC,
Appellant,

vs.

I. F. P. Minnesota,
Respondent.

Filed April 21, 2009
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62C407004964

Kyle J. Hegna, Todd J. Baumgartner, Wilkerson & Hegna, P.L.L.P., Suite 300, 7300 Metro Boulevard, Edina, MN 55439 (for appellant)

Kay Nord Hunt, Stephen C. Rathke, Brett P. Clark, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, 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

STONEBURNER, Judge

Appellant lessor challenges summary judgment dismissing its action for reformation of a lease and denial of its motion to amend the complaint to add a claim for rescission. Because the district court did not err in concluding that, as a matter of law, appellant is not entitled to reformation or rescission, we affirm.

FACTS

In 2004, respondent IFP Minnesota (IFP), a non-profit corporation, entered into a 20-year lease (the lease) for office space in a building (the building) then owned by Troika Properties, LLC (Troika), predecessor-in-interest to appellant 2446 University Avenue, LLC (2446UA). When the lease was negotiated, Troika was in the process of remodeling the building. The rental rate under the lease is based on "approximately 6,900" rentable square feet (RSF)[1] for the first five years of the lease and "approximately 7,475" RSF for the remainder of the lease, without any change in the actual RSF leased.

In the summer of 2006, Patricia Jordan, owner and managing partner of 2446UA, expressed interest in buying the building from Troika. Jordan asserts that Wade Swanson, one of Troika's owners,[2] told her that the discrepancy in RSF figures in the IFP

[1] RSF is calculated in this case by multiplying the area over which a tenant has exclusive control (useable square feet—USF) by 115% to account for a tenant's use of common areas.

[2] The record shows that Swanson was a co-owner of Troika when the lease was negotiated and signed, but does not show his ownership interest or whether he was an officer of the corporation.

lease was a "mistake and that it needed to be corrected."[3] For reasons unrelated to IFP's lease, Jordan decided not to purchase the building in the summer of 2006. In November 2006, the building was in foreclosure and scheduled for a sheriff's sale. A partnership in which Jordan is a principal purchased the building in December 2006, and 2446UA subsequently bought the building from the partnership. All of the leases between Troika and the building's tenants, including IFP, were assigned to 2446UA.

After 2446UA purchased the building, Jordan retained Drew Magnuson of Finn Daniels Architects, Inc. to measure the floor area of the building. Based on Magnuson's determination that IFP actually leases 8,889 RSF, 2446UA sued IFP for breach of lease, unjust enrichment, quantum meruit, and to reform the lease based on mutual mistake.

Discovery revealed the following undisputed facts. The lease was negotiated by IFP's executive director, Jane Minton, and Trioka's president, Jack Granlund, who was assisted by Troika's real estate agent, Kou Vang. Wade Swanson took no part in lease negotiations and did not sign the lease.

Based on the then-existing remodeling plans, Granlund estimated that the suite Minton was interested in would be approximately 6,000 USF resulting in 6,900 RSF. Granlund's initial offer to IFP calculated rent based on "approximately 6,900 RSF."

IFP's architect was concerned that the drawings Granlund relied on did not accurately reflect structural walls and other aspects of the building that would affect the actual square footage of the suite. Minton e-mailed Vang expressing IFP's concern that

[3] Swanson denies making this statement but for purposes of summary judgment, the evidence is viewed in the light most favorable to 2446UA.

the actual space IFP would be leasing was much less than 6,900 RSF and stating that IFP could not sign a lease "until we have the exact figure." IFP's architect then measured the space and concluded that RSF for the space was 7,475.

Minton notified Troika that IFP could not afford a lease based on 7,475 RSF. IFP and Troika ultimately entered into the lease that calculates rent based on "approximately 6,900 RSF" for the first 60 months and "approximately 7,475 RSF" for the remainder of the lease, without any change in actual USF/RSF leased.

On cross-motions for summary judgment, the district court concluded that, as a matter of law, there was no mutual mistake that would entitle Troika or 2446UA as its successor-in-interest to reformation or rescission of the lease. The district court further concluded that Troika bore the risk of any mistake in RSF. The district court denied 2446UA's motion to amend the complaint to add a claim for rescission to the complaint and granted summary judgment to IFP dismissing the complaint. This appeal followed.

D E C I S I O N

I. Standard of review on appeal from summary judgment

On appeal from summary judgment, we ask only whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We "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). Evidence which merely creates a metaphysical doubt as to a factual issue but is not sufficiently probative to permit reasonable persons to draw different conclusions about an essential element of the claim does not create a genuine

issue of material fact for trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). When there are no genuine issues of material fact, we review the district court's decision de novo to determine whether it erred in applying the law. *Art Goebel Inc. v. N. Suburban Agencies*, 567 N.W.2d 511, 515 (Minn. 1997).

II. Contract reformation

Reformation of a written contract requires (1) a valid agreement between the parties expressing their real intentions and (2) a written agreement that fails to express those intentions due to either mutual mistake of the parties or unilateral mistake by one party accompanied by fraud or inequitable conduct by the other party. *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980). "When both parties acted in good faith and neither misled the other, but nevertheless each party was mistaken and thought he was making a different contract from what the other party supposed he was making, reformation is not an appropriate remedy." *Id*. "Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation." *Id*.

A. Mutual mistake

"[I]n order to have a mutual mistake, it is necessary that both parties agree as to the content of the document but that somehow through a scrivener's error the document does not reflect that agreement." *Id*. 2446UA does not dispute that Troika and IFP negotiated a rent for the first five years that does not reflect actual space leased, but asserts that there is at least a fact question about whether both parties intended the rent for the remainder of the lease to be based on a precise measurement of actual RSF leased.

2446UA relies on Minton's e-mail stating that IFP could not sign a lease until it had the "exact figure." But at most, the record shows that Minton unilaterally believed 7,475 RSF to be accurate. There is no evidence in the record disputing Granlund's deposition testimony that, because remodeling was not complete when the lease was signed, he was well aware that both of the RSF figures used for calculating rent in the lease were merely terms negotiated "in order to drive a rent number." Granlund, as president of Troika, had the authority to bind the corporation to the lease. And Granlund's knowledge is imputable to Troika. *See Brooks Upholstering Co. v. Aetna Ins. Co.*, 276 Minn. 257, 262, 149 N.W.2d 502, 506 (1967) (stating that an officer's knowledge is imputable to a corporation if the officer is acting within the scope of his duties). Granlund, on behalf of Troika, was willing to use IFP's 7,475-RSF figure to establish an acceptable rent after the first five years whether or not that figure precisely reflect actual RSF leased.

2446UA relies on Jordan's assertion that Swanson told her that there was a mistake in the lease that needed to be corrected to assert that there is a fact question about what Troika intended. But only facts that would be admissible into evidence can create a question of fact to defeat summary judgment. *See* Minn. R. Civ. P. 56.05 (stating that affidavits supporting or opposing a summary judgment motion shall be made on personal knowledge and "shall set forth such facts as would be admissible in evidence"). 2446UA does not explain how this hearsay would be admissible as substantive evidence to show the intent of the parties to the lease. Additionally, Swanson's comment in September 2006 could only have referred to the discrepancy between the use of 6,900 RSF and 7,475 RSF to calculate IFP's rent because no one, at that time, knew of any other actual

discrepancy or "mistake" in the RSF figures. The district court correctly concluded that Swanson's alleged comment does not create a question of material fact that would defeat summary judgment on 2446UA's claim of mutual mistake entitling 2446UA to reformation of the lease to calculate rent based on 8,889 RSF.

B. Risk of mistake

2446UA argues that the district court erred in concluding that Troika bore the risk of mistake. 2446UA argues that Troika was entitled to rely on IFP's measurement as accurate. *See Restatement (Second) of Contracts*, § 152(1) (1981) (discussing voidability of contract for mutual mistake unless the adversely affected party bears the risk of the mistake). 2446UA cites real-estate-purchase-contract cases for the proposition that a buyer may reasonably rely on representations of a seller without making an independent inquiry. We find these cases irrelevant to the facts of this case because Granlund testified that he did not rely on IFP's measurements as accurately stating RSF leased and that the RSF numbers "were negotiated . . . to drive a rent number." The district court did not err in holding that Troika bore the risk that RSF figures used in the lease did not accurately reflect RSF leased.

III. Unilateral mistake

2446UA asserts that a material fact question exists about whether Minton inequitably induced Troika to rely on 7,475 RSF as an accurate measurement, thereby entitling 2446UA, as Troika's successor-in-interest to reform or avoid the lease based on unilateral mistake. This argument was not raised in the district court, and therefore is waived on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that

this court generally will not consider matters not argued to and considered by the district court). Even if we were to consider this argument, we would conclude that it is without merit. There is no evidence that Minton knew or had any reason to know that 7,475 was not an accurate measurement, and there is undisputed evidence that Granlund was not relying on the number as anything other than an approximation. 2446UA has not raised a material fact question of unilateral mistake.

IV. Ambiguity of the lease

For the first time on appeal, 2446UA argues that the lease is facially ambiguous and requires a fact finder to consider extrinsic evidence. Even ignoring the fact that this question was not presented to the district court, the argument is not persuasive because none of the ambiguities asserted by 2446UA are remotely material to whether 2446UA is entitled to reformation or rescission of the lease.

V. Motion to amend

Because the district court correctly concluded that 2446UA is not entitled to relief for mutual mistake, the district court did not err in denying 2446UA's motion to amend the complaint to add a claim for rescission.

Affirmed.