STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1859

Village Bank,
Respondent,

vs.

Sienna Corporation, et al.,
Appellants,

Schuett Homes, Inc., et al.,
Defendants.

Filed July 28, 2009
Affirmed
Schellhas, Judge

Anoka County District Court
File No. 02-CV-08-40

Steven L. Mackey, Law Office of Steven L. Mackey, 1054 Bucher Avenue, Shoreview, MN 55126; and

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K. Peter Stalland, Law Office of K. Peter Stalland, 9983 Arcola Court North, Stillwater, MN 55082; and

Todd R. Haugan, Haugan Law Office, Ltd., 746 Mill Street, Wayzata, MN 55391 (for appellants)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

SCHELLHAS, Judge

On appeal from summary judgment, appellants argue that the district court erred because (1) appellants had not completed discovery, and (2) genuine issues of material fact exist regarding appellants' (a) defense of breach of the implied covenant of good faith and fair dealing, (b) assertion that respondent may have violated its own underwriting regulations, (c) possible counterclaim of tortious interference with contractual relation, and (d) possible counterclaim of tortious interference with a prospective business relationship. We affirm.

FACTS

In August 2005 respondent Village Bank agreed to loan appellant Sienna Corporation (Sienna) $10,090,000 to develop the Gardenwood Project, a multi-phase residential development project. Sienna executed a promissory note and mortgage in favor of Village Bank (Village Bank mortgage). Appellants Bruce G. Nimmer, President of Sienna, Rodney D. Hardy, Vice President of Sienna, and John H. Hankinson signed personal guaranties to secure Sienna's indebtedness to Village Bank. Also, in August 2005 Village Bank provided Sienna an unsecured line of credit in the amount of $500,000 ($500K LOC), evidenced by Sienna's promissory note with a maturity date of August 15, 2006, and personally guaranteed by Nimmer, Hardy, and Hankinson.

In April 2006 Sienna executed an amended and restated promissory note in favor of Village Bank in the amount of $12,590,000 (Village Bank note) and a modification agreement regarding the Village Bank mortgage. The Village Bank note and the $500K

LOC contained cross-default provisions as did the modification agreement and Village Bank mortgage.

Sometime before August 15, 2006, Nimmer asked Village Bank to extend the maturity date of the $500K LOC. On the same date, Craig Zemke, Senior Vice President of Village Bank, e-mailed Nimmer stating in part:

> Bruce, I just received this month's draw request for Gardenwood. That draw is for approximately $510K. As you will recall, the commitment for the $1.250K included paying off the $500K line of credit when it matured. That was today, so after that transfer, the current draw request, there will only be approximately $30K left available to draw. I trust the lot takedowns from Toll Brothers and Kootenia will take place prior to the need for the next draw request.

The above-noted draw request (Draw Request No. 6) received by Zemke showed a budget line item for construction interest with available loan proceeds, not yet funded, in the amount of $226,919 (construction interest reserve). On August 22, Village Bank withdrew from the construction interest reserve the sum of $497,002.10 to pay off the $500K LOC and it stamped the $500K LOC note "Paid in Full 8-22-06." This action left a negative balance in the construction interest reserve.

On August 25, 2006, Cathy Thornhill of Sienna e-mailed Zemke, stating:

> I am following up on your email to Bruce Nimmer regarding the Gardenwood loan and the $500K line of credit.
>
> I have attached a draw request form with the balance of the line of credit ($496,109.80). According to my figures we are over the $12,500,000 when the $60,000 letter of credit is included. Please review the documents and call me to discuss.

> I have also included a worksheet that I keep for each mortgage showing draws and release payments. My balance is $787.58 higher than the principal balance on the loan interest statement. Is there a statement that you could have someone send to me that shows your disbursements so that I can reconcile this loan account?

The draw request referred to by Thornhill is Draw Request No. 7, which reflected a negative balance of $270,082.20 in the budget line item for the construction interest reserve.

In October 2007 Sienna defaulted on the Village Bank note by failing to make scheduled payments.

In January 2008 Village Bank commenced this action to collect the indebtedness owed on the Village Bank note, to foreclose the Village Bank mortgage, and to enforce the individual guaranties as to any judgment deficiency. Sienna and the guarantors (collectively "appellants") filed a joint and separate answer and admitted that Sienna had not made all payments due under the note. As affirmative defenses appellants alleged, among other things, that Village Bank had unclean hands and had breached the implied covenant of good faith and fair dealing.

On July 3, 2008, Village Bank served and filed a motion for summary judgment on all claims, a judicial decree of mortgage foreclosure, an order for sale, and a declaratory judgment establishing Village Bank's mortgage priority. In support of the motion, Zemke filed an affidavit stating that: Sienna failed to make payments on the Village Bank note from October 2007 through April 2008; Sienna and the guarantors had

not made past-due payments within a ten-day cure period; and the guarantors refused to honor their guaranties.

On July 16, 2008, appellants obtained new counsel, who sought a continuance of the summary judgment hearing set for July 31. Appellants' new counsel advised the district court that Sienna intended to move the court to amend the complaint and to join additional parties and that no discovery on behalf of appellants had been conducted. The district court denied the request for a continuance.

Appellants opposed summary judgment in part by filing an affidavit of counsel with attachments that included: (1) an unsigned motion to amend their answer to assert one or more unspecified counterclaims; (2) interrogatories to Village Bank; (3) a request for production of documents to Village Bank; (4) a notice of taking deposition of Zemke; and (5) a notice of taking deposition of Larry Schiminski, President of Village Bank. Hardy also filed an affidavit stating that, in the spring of 2008, he spent considerable time negotiating a possible sale of the Gardenwood Project to Neighborhood Development Partners, LLC (NDP). According to Hardy, the goal of the sale was "to potentially pay off Village Bank's loan." Hardy stated that, on May 5, 2008, he received an e-mail from Chris Enger of NDP, informing him that: "Representatives from the bank have been in direct contact with us, and have informed us that they have foreclosed on Gardenwood. The[y] have further asked us to make any offers directly to them." Soon after Hardy's receipt of the e-mail, NDP terminated negotiations with Sienna.

Nimmer also filed an affidavit in opposition to summary judgment. Nimmer challenged Zemke's assertion that the commitment for the $12,590,000 loan included

paying off the $500K LOC. Nimmer maintained that the construction interest reserve was used to pay off the loan's accruing interest on a monthly basis so that Sienna was not forced to pay the interest prior to sales. Nimmer claimed that Village Bank's withdrawal of funds from the interest reserve deprived Sienna of the ability to complete certain construction improvements which, if completed, would have obligated Kootenia Homes to purchase lots from Sienna and that this revenue would have been available to keep the Village Bank note and Village Bank mortgage current.

Nimmer and Hardy each submitted affidavits stating that he could not recall signing a personal guaranty for the $500K LOC note.

Zemke filed a supplemental affidavit regarding Sienna's alleged negotiations to sell Gardenwood to NDP, stating that NDP submitted an offer to Village Bank to purchase Village Bank's entire interest in Gardenwood for only $2,700,000. Zemke attached to his affidavit copies of guaranties dated August 15, 2005, and signed by Hardy, Hankinson, and Nimmer that guarantied "any and all" of Sienna's indebtedness to Village Bank.

On October 14, 2008, the district court granted Village Bank a judgment against all appellants and judicial decree of mortgage foreclosure; ruled that Village Bank also would be entitled to a judgment for any deficiency; and decreed that the Village Bank mortgage is a valid lien superior to the interests of other defendants named in Village Bank's actions, except a first mortgage held by S.R. Weidema, Inc.

This appeal follows.

D E C I S I O N

I. Continuance

Appellants actually requested twice that the district court continue the summary-judgment motion hearing, once by e-mail and once by formal motion. The district court denied the e-mail request and did not specifically address the formal motion. But by granting summary judgment to Village Bank, the district court implicitly denied appellants' motion for continuance. *See Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. App. 2003) (addressing a motion for a continuance to complete discovery and stating: "The district court did not explicitly rule on the motion, but it implicitly denied the motion by granting the [opposing party's] motion for summary judgment.").

A continuance to complete discovery is governed by Minn. R. Civ. P. 56.06. Under rule 56.06, when it appears from the affidavits of a party opposing summary judgment that the party cannot "*for reasons stated* present, by affidavit, facts essential to justify the party's opposition," the district court may refuse an application for judgment or order a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had." (Emphasis added.) "A rule 56.06 affidavit must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date." *Alliance for Metro. Stability*, 671 N.W.2d at 919.

Denial of a request for a continuance to complete discovery is reviewed for an abuse of discretion. *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339,

346 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998). "There is a presumption in favor of granting a request for a continuance to allow additional time for discovery." *Id.* at 345 (citing *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982)). "A continuance or permission to engage in further discovery should not be denied to a party except in the most extreme circumstances." *Rice*, 320 N.W.2d at 412 (quoting 2 J. Hetland & O. Adamson, *Minnesota Practice* 588 (1970)). "But the court should consider whether the party seeking a continuance has been diligent and whether the party has a good faith belief that material facts will be uncovered." *Cherne*, 572 N.W.2d at 345.

Here, appellants failed to comply with rule 56.06 and were not diligent. Appellants failed to comply with the rule because they failed to support their request for a continuance with a rule 56.06 affidavit stating the reasons why they could not present facts essential to justify their opposition to summary judgment. Appellants did not describe the reasons for their failure to conduct discovery or the evidence they expected to discover, if granted a continuance. Appellants were not diligent because they did not seek discovery until seven months after Village Bank commenced its action. *See Liberty Mut. Ins. v. Ne. Concrete Prods., LLC*, 756 N.W.2d 93, 105-06 (Minn. App. 2008) (concluding that a party was not diligent because the party did not seek depositions in the six months between commencement of the action and the first summary-judgment hearing); *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. App. 2006) (concluding a party was not diligent because the party did not initiate discovery despite having approximately seven months to do so). We therefore conclude the district court did not abuse its discretion in denying appellants' request for a continuance.

II. No Genuine Issues of Fact

A. Implied Covenant of Good Faith and Fair Dealing

Appellants argue that the district court erred in granting Village Bank summary judgment because appellants have established a prima facie case that Village Bank breached the implied covenant of good faith and fair dealing. The district court did not rule on this defense but rejection of it is implicit in the court's grant of summary judgment to Village Bank. *See Alliance for Metro. Stability*, 671 N.W.2d at 919 (concluding a motion was implicitly denied).

Appellants rely on *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502-03 (Minn. 1995), which states that "every contract contains an implied covenant of good faith and fair dealing requiring that one party not 'unjustifiably hinder' the other party's performance of the contract." *But see Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 303 n.5 (Minn. App. 2004) (stating that "[t]he implied covenant of good faith and fair dealing does not apply to sales contracts, *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998), or to employment contracts, *Lee v. Metro. Airport Comm'n*, 428 N.W.2d 815, 822 (Minn. App. 1988)").

Appellants argue that Village Bank breached the implied covenant of good faith and fair dealing when it withdrew funds budgeted for its construction interest reserve; it did so without notice, consent, or legal right; and it caused appellants' default. Appellants' reliance on this defense fails as a matter of law because appellants have not established that the bank acted in bad faith. In cases addressing breach of this covenant, this court has applied the rule that "[a]ctions are done in good faith when done honestly,

whether it be negligently or not," and that "actions are done in bad faith when a party's refusal to fulfill some duty or contractual obligation is based on an ulterior motive, not an honest mistake regarding one's rights or duties." *Prairie Island Indian Cmty. v. Minn. Dept. of Pub. Safety*, 658 N.W.2d 876, 889 (Minn. App. 2003) (quotations omitted). Appellants have not argued that Village Bank acted dishonestly or based on an ulterior motive; instead, they argue that Village Bank lacked a legal right to withdraw the funds. Even if appellants are correct that Village Bank lacked a legal right to withdraw the funds, appellants have proffered no evidence to show that Village Bank's actions were based on "an ulterior motive" or were not "an honest mistake" about its legal rights. Moreover, based on the cross-default provisions contained in the $500K LOC, the Village Bank note, and the Village Bank mortgage, if Sienna had failed to pay off the $500K LOC, it would have been in default under the Village Bank note and Village Bank mortgage, a circumstance that would have relieved Village Bank of any obligation to fund the construction interest reserve or any other budget line items. Appellants' argument that a genuine issue of material fact exists with respect to its defense that Village Bank breached an implied covenant of good faith and fair dealing fails.

B. Underwriting Regulations

Appellants argue on appeal that Schminski said that Village Bank could not loan more than $10,090,000 for the acquisition of land without violating the bank's underwriting regulations, and that "[t]o the extent that any such regulations were based on federal banking statutes and regulations, it is possible that [Village Bank] also violated federal law." Appellants did not raise this argument before the district court and it is

therefore waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that arguments not raised before the district court are waived). We decline to address this argument for the first time on appeal.

C. Tortious Interference with Existing Contract

The district court did not explicitly rule on appellants' argument that they should be allowed to develop facts related to a possible counterclaim of tortious interference with an existing contract in discovery. But the district court implicitly rejected appellants' argument by granting summary judgment to Village Bank. *See Alliance for Metro. Stability*, 671 N.W.2d at 919 (concluding a motion was implicitly denied).

Tortious interference with an existing contract has five elements: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (quoting *Furlev Sales and Assoc., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982)). Appellants argue that the contract at issue was "a contract" between Sienna and Village Bank. They argue that Village Bank knew of the contract, and that Village Bank intentionally procured its breach by interfering with sale negotiations, which appellants argue prevented a sale that would have led to appellants satisfying their obligations to Village Bank. Appellants seem to refer to Village Bank note as the contract between Sienna and Village Bank.

Appellants' reliance on this theory of recovery is misplaced because Village Bank is a party to the contract at issue. Under *Nordling v. Northern States Power Co.*, 478

N.W.2d 498, 505-06 (Minn. 1991), "[t]he general rule is that a party cannot interfere with its own contract." The *Nordling* rule has been phrased by this court as "[p]arties to a contract cannot be held liable for tortious interference." *Lipka v. Minn. Sch. Employees Ass'n Local 1980*, 537 N.W.2d 624, 631 (Minn. App. 1995) (citing *Nordling*, 478 N.W.2d at 505), *aff'd*, 550 N.W.2d 618. Moreover, consistent with the *Nordling* rule, the supreme court has stated that the elements of tortious interference with a contract require that the interfering party be a "third party." *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998) ("Once a party to a contract has established that tortious interference by a third party has occurred, the courts may hold that third party liable for any resulting damages as well as grant necessary injunctive relief."). Because Village Bank was a party to the contract at issue, appellants' reliance on tortious interference with an existing contract fails as a matter of law.

D. Tortious Interference with Prospective Contract

In their reply brief, appellants argue that Village Bank may have tortiously interfered with prospective business relations between Sienna and NDP. Appellants waived this argument because they did not raise it before the district court or in their principal brief before this court. *See Thiele*, 425 N.W.2d at 582 (stating that arguments not raised before the district court are waived); *see also Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that this court does not consider an issue raised in a reply brief that was not raised or argued in the appellant's principal brief). We decline to address this argument for the first time on appeal.

Affirmed.