STATE OF MINNESOTA
IN COURT OF APPEALS
A09-576

Jerald Alan Hammann,
Appellant,

vs.

Falls/Pinnacle, LLC, a Delaware limited liability company, et al.,
Respondents.

Filed January 19, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-06-8335

Jerald A. Hammann, Eden Prairie, Minnesota (pro se appellant)

Dean B. Thomson, Theodore V. Roberts, Fabyanske, Westra, Hart & Thomson, Minneapolis, Minnesota (for respondent Falls/Pinnacle)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Crippen, Judge.[*]

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

WRIGHT, Judge

Appellant challenges the district court's decision denying his motion to vacate its summary judgment in favor of respondents under Minn. R. Civ. P. 60.02, brought after

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

this court affirmed the summary judgment, and the Minnesota Supreme Court denied review. We affirm.

FACTS

In April 2006, appellant Jerald Hammann sued respondent Falls/Pinnacle, LLC, et al., seeking real estate commissions allegedly due and other damages in connection with the sale of condominium units by Falls/Pinnacle. The district court granted summary judgment to Falls/Pinnacle and awarded Falls/Pinnacle attorney fees and costs as well as monetary sanctions under Minn. R. Civ. P. 11. Hammann appealed, this court affirmed, and the Minnesota Supreme Court denied review. *Hammann v. Falls/Pinnacle, LLC*, No. A07-515, 2008 WL 933446 (Minn. App. Apr. 8, 2008), *review denied* (Minn. June 18, 2008). Hammann then returned to the district court and moved to vacate the summary judgment under Minn. R. Civ. P. 60.02. The district court denied relief, and this appeal followed.

D E C I S I O N

An appellate court will not reverse an order denying a motion to vacate a judgment under Minn. R. Civ. P. 60.02 unless the district court abused its discretion. *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996).

A party who seeks to vacate summary judgment under rule 60.02 must establish (1) a reasonable claim on the merits, (2) a reasonable excuse for failing or neglecting to act, (3) that the party acted with due diligence after notice of entry of judgment, and (4) that the other party will not suffer substantial prejudice. *Northland Temps., Inc. v.*

Turpin, 744 N.W.2d 398, 402 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). "But before relief will be granted from a final order or judgment, the moving party must also establish to the satisfaction of the court that it possesses a meritorious claim." *Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988). Here, the district court ruled that, as it had determined in its summary judgment, Hammann had no reasonable case on the merits. As demonstrated by our affirmance of the summary judgment, we agree and, thus, Hammann could not prevail on his motion to vacate.

Nonetheless, we will also address, as did the district court, Hammann's rule 60 arguments. The first issue concerns the timeliness of Hammann's motion under rule 60.02(a), (b), and (c), which requires that the motion be brought not more than one year after the judgment. Otherwise, it will be deemed untimely and the movant will not be entitled to relief. *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 923 (Minn. 1990). Because judgment was entered in January 2007 and Hammann brought the motion in October 2008, the district court ruled that the motion was untimely. We have reviewed Hammann's various arguments to the contrary, and we conclude that they are without merit. Thus, we agree with the district court's conclusion that the motion is time-barred.

Hammann's arguments on the merits of his rule 60 motion also fail. Hammann argues that he presented evidence of material mistake by this court in our decision affirming summary judgment. *See* Minn. R. Civ. P. 60.02(a) (providing for relief from final judgment for mistake). But Hammann cites no authority that specifically permits a district court to alter a ruling of an appellate court, and we reject his argument that rule 60

allows such alteration of an appellate ruling. *See Carter*, 554 N.W.2d at 114 (finding it doubtful that rule 60 could be used to correct perceived judicial error). Hammann properly raised his challenges to this court's decision by petitioning the Minnesota Supreme Court for further review, which was denied. *Hammann*, 2008 WL 933446, at *1. That denial rendered this court's opinion final. *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988).

Hammann, however, contends that because the Minnesota Supreme Court's review of this court's decision is discretionary, his constitutional right to a full and fair opportunity to be heard was violated, and, therefore, a rule 60.02 motion to vacate is a proper vehicle to remedy appellate error. The Minnesota Supreme Court has ruled, however, that the Minnesota Constitution does not guarantee a right of appeal to the Minnesota Supreme Court to one who is dissatisfied by the decision of a lower court. *In re O'Rourke*, 300 Minn. 158, 164-65, 220 N.W.2d 811, 815 (1974). Hammann's argument to the contrary fails.

Next, Hammann argues that the district court should have vacated its summary judgment based on newly discovered evidence under Minn. R. Civ. P. 60.02(b). Newly discovered evidence must be that "which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03." Minn. R. Civ. P. 60.02(b). The newly discovered evidence "must be relevant and admissible at trial, must be likely to have an effect on the result of a new trial, and must not be merely collateral, impeaching, or cumulative." *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 478 (Minn. App. 1987), *review denied* (Minn. July 15, 1987).

Hammann first cites as "newly discovered evidence" his argument that there was no evidence that the broker registration form, which contained limitations on commissions for the sale of the condominiums, existed before June 19, 2005. The district court deemed this argument exaggerated and correctly ruled that, in any event, it would not affect the summary judgment order or result in a new trial. Hammann also asserted that the sales agreement was thus never amended accordingly. We agree with the district court's ruling that this is not a basis for relief.

Next, Hammann cites various statements by Donald Deyo, who had signed an agreement with Hammann to purchase a unit from him, which Hammann later cancelled. Hammann had signed an agreement to purchase this same unit from Falls/Pinnacle, which also was cancelled. Hammann asserts that, had he known of Deyo's statements, he would have prevailed on interference-related claims against Falls/Pinnacle involving Deyo. As the district court ruled, these statements were merely collateral evidence and, moreover, in the cancellation agreement that Hammann signed with Falls/ Pinnacle, he waived any claims against Falls/Pinnacle.

Hammann also cites Falls/Pinnacles' alleged concealment of water intrusion problems. The district court properly found this irrelevant, observing that, because it had denied Hammann's motion to amend the complaint to add that claim, no such claim regarding the water intrusion existed.

Hammann also asserts that evidence of legislative intent regarding several statutes was newly discovered evidence. As the district court ruled, this "evidence" was legal research that was available at the time of the summary judgment motion and is not newly

discovered evidence. In summary, our careful review of the claims raised by Hammann leads us to conclude that Hammann has not demonstrated that the district court abused its discretion in denying his motion to vacate based on newly discovered evidence.

Next, we review the district court's denial of Hammann's motion to vacate based on fraud under rule 60.02(c). To vacate a judgment for fraud, "the moving party must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct which prevented it from fully and fairly presenting its case." *Id.* at 480. The alleged misconduct must go to the ultimate issue of the case, rather than address merely a collateral issue. *Id.* at 480-81.

Hammann asserts that Falls/Pinnacle engaged in fraud because it (a) denied that written contracts regarding commissions existed, although they did; (b) made misrepresentations in arguments regarding various statutory disclosure requirements, Hammann's claims involving Deyo, and the timing of Hammann's knowledge of those claims; and (c) agreed to allow Hammann to obtain discovery material without court action but then failed to act in good faith. The district court found that Falls/Pinnacle did not make fraudulent misrepresentations to the district court, and on this record, the district court's findings are not clearly erroneous. Rather, the district court found that counsel for Falls/Pinnacle submitted the facts and law to the district court and argued in favor of his clients, as Hammann was under a duty to do for himself.

Regardless of any representations by counsel or Hammann, the district court indicated that it reviewed the evidence submitted and the law and formulated its conclusions accordingly. Hammann criticizes the district court for directing

Falls/Pinnacle to prepare findings for the court, which the district court adopted almost verbatim. It is preferable for a district court to independently develop its findings. But when a district court adopts a party's proposed findings, the reviewing court will carefully review whether the findings are clearly erroneous. *Sigurdson v. Isanti County*, 408 N.W.2d 654, 657 (Minn. App. 1987), *review denied* (Minn. Aug. 19, 1987). This issue, however, should be raised on appeal, not in a rule 60.02 motion.

Finally, Hammann asserts that he is entitled to relief under Minn. R. Civ. P. 60.02(f) for a variety of reasons. Relief may be granted under rule 60.02(f) for "[a]ny other reason justifying relief from the operation of the judgment," and the motion need only be brought within a reasonable time after the judgment. Rule 60.02(f) is "a residual clause to cover any unforeseen contingency" and is exclusive of clauses (a) through (e). *Anderson v. Anderson*, 288 Minn. 514, 518, 179 N.W.2d 718, 722 (1970). "Relief under this residual clause is appropriate when the equities weigh heavily in favor of the party seeking relief and relief is required to avoid an unconscionable result." *Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142-43 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990).

Hammann argues that the district court wrongfully awarded attorney fees and sanctions in the summary judgment. This court affirmed his challenge on appeal, and the Minnesota Supreme Court denied the petition for review. *Hammann*, 2008 WL 933446, at *10-*11. Rule 60.02 is not the proper means to raise alleged judicial error. *See Carter*, 554 N.W.2d at 114. Hammann also claims that he demonstrated that he is entitled to relief for other reasons, including that there was a "wrongful stigma" against

him for an incorrect order, that the judgment interferes with his valid claims against co-conspirators, and that he likely would be unable to recover damages from Kamper Realty. Hammann has not demonstrated that the district court abused its discretion by denying him relief on these grounds.

Hammann further contends that the district court abused its discretion by denying his motion to stay the summary judgment motion and that the district court improperly weighed the evidence. These are arguments properly raised on appeal from summary judgment, not in a motion to vacate. Moreover, they do not establish that the district court abused its discretion by denying his motion to vacate.

Affirmed.