STATE OF MINNESOTA
IN COURT OF APPEALS
A10-23

Tim Mulcahy,
Respondent,

vs.

Fenton Sub Parcel D, LLC,
a Delaware limited liability company, et al.,
Appellants,

Wells Fargo Bank, N. A.,
as Trustee for the Registered Holders of J. P. Morgan
Chase Commercial Mortgage Securities Corp,
Commercial Mortgage Pass-Through Certificates, Series 2004-LN2,
Defendant.

Filed October 26, 2010
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-08-598

Scott G. Harris, Timothy M. Kelley, Leonard, Street and Deinard, Minneapolis, Minnesota (for respondent)

George R. Serdar, Joshua A. Hasko, Jerome J. Simons, Messerli & Kramer, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

In this real-estate-conveyance dispute, appellant-sellers argue that (a) the district court erred in denying their motion to apply the election-of-remedies doctrine; (b) the record does not support the finding that sellers failed to use due diligence and make a good-faith effort to fulfill the defeasance of the property from the mortgage as required under the purchase agreement; (c) the district court erred in ordering the sale of the property to respondent without an exception for the mortgage; (d) the district court miscalculated its equitable monetary offset award to respondent for the delay in the conveyance of the property; and (e) the district court's award of specific performance to respondent is inconsistent with the jury's verdict of no fraud by appellants. Respondent contends that his equitable monetary offset should have been awarded as a monetary judgment, rather than as a reduction in the purchase price. We affirm.

FACTS

Appellants are limited-liability companies that own a group of six commercial properties known as "Pool D properties." Among them is a commercial building known as the "Cahill."

On August 8, 2007, appellants entered into a purchase agreement with respondent Tim Mulcahy for the sale of the Cahill for $4,000,000. At the time, the Pool D properties collectively were, and they still are, encumbered by a mortgage with a principal indebtedness of $11,604,000.

Section 5 of the purchase agreement provided that, "[a]s a condition precedent to [appellants'] conveyance of this Property to [Mulcahy] free from the Mortgage, [appellants] must defease the Property pursuant to the Mortgage," and that appellants "will work diligently to pursue, at [their] sole expense, defeasance . . ." prior to closing. That section also provided for the automatic termination of the agreement if appellants, despite "good faith efforts," are unable to "complete the defeasance prior to the Closing Date . . . ." The agreement contained no financing contingency for defeasance of the mortgage but did provide that Mulcahy was allowed to obtain financing for the purchase on terms and conditions acceptable to him "and to be determined in [Mulcahy's] sole discretion."

Appellants sought loans from TCF Bank, NorthMarq Capital, Inc., and Associated Bank in amounts to defease not only the Pool D properties but also Pool A and B properties that appellants owned. TCF declined to lend money to appellants. Associated Bank proposed a loan of $21,000,000, but did not issue a binding commitment. NorthMarq committed to a loan of $18,000,000 and was willing to close on a loan in that amount. Appellants decided to reject the NorthMarq loan and instead to pursue Associated Bank's proposal. Ultimately, Associated Bank declined to approve the loan. Appellants did not seek to revive the NorthMarq commitment or to obtain alternative financing. After extending the Cahill property closing date, appellants notified Mulcahy that they had elected to terminate the purchase agreement because they had not been able to obtain financing for the defeasance of the mortgage encumbering the property.

Mulcahy sued the appellants, alleging fraud in the inducement and negligent misrepresentation, and breach of contract. As principal remedies, he sought a declaratory judgment that the purchase agreement remained in effect and binding, and the district court's order for specific performance of the agreement. In the alternative, he sought money damages on the fraud and misrepresentation claims. The appellants moved to compel Mulcahy to elect his remedy between the fraud claim and the contract claim, but the district court denied the motion and ruled the fraud claim was to be tried to the jury and the contract claim to the court.

The jury issues were tried first and resulted in a verdict in favor of the appellants. After a bench trial on the contract claim, the district court found that the appellants had defaulted in their obligations under the purchase agreement and Mulcahy was entitled to the specific enforcement of the agreement together with an equitable offset against the purchase price for monetary losses resulting from the appellants' default.

On appeal, the appellants contend the district court erred in declining to compel Mulcahy to elect his remedies, in determining that the appellants defaulted on the purchase agreement, in ordering specific performance, and in awarding monetary losses to Mulcahy. Mulcahy, by notice of review, challenges the district court's award of an equitable offset of certain sums against the purchase price of the property instead of a money judgment in those sums.

This appeal followed.

D E C I S I O N

Election of remedy

Appellants argue that the district court erred in failing to grant their motion to compel Mulcahy to elect his remedy as between fraud and specific performance, and by allowing him to pursue inconsistent theories at trial. The doctrine of election of remedies applies only where a party adopts one of two or more coexisting and inconsistent remedies. *Christensen v. Eggen,* 577 N.W.2d 221, 224 (Minn. 1998). The purpose of the doctrine is not to prevent recourse to a potential remedy but to prevent double redress for a single wrong. *Id.* "Generally, a party is not bound by an election unless he has pursued the chosen course to a determinative conclusion or has procured advantage therefrom, or has thereby subjected his adversary to injury." *Kosbau v. Dress,* 400 N.W.2d 106, 110 (Minn. App. 1987) (quotation omitted). We note that appellants appear to confuse election of remedies with pleading multiple claims. Fraud is a claim for which the usual remedy is money damages. *See Pigs R Us, LLC v. Compton Twp.*, 770 N.W.2d 212, 215 (Minn. App. 2009) (stating that, generally, "the ultimate goal of a tort action is to secure money damages"). Specific performance is a remedy available for certain claims, including some breach-of-contract claims. *See Loppe v. Steiner*, 699 N.W.2d 342, 349 (Minn. App. 2005) (finding a party may pursue specific performance or, in the alternative, damages for breach of contract).

In a contract dispute, the election-of-remedies doctrine requires a plaintiff to choose whether to affirm and enforce or to disaffirm a contract. *Id.* A party may not recover damages based on a breach of the contract once that party elects to cancel the contract. *Covington v. Pritchett*, 428 N.W.2d 121, 124 (Minn. App. 1988). However, "fraud in inducing a contract and a later breach of that contract represent two distinct causes of action under Minnesota law." *McDonald v. Johnson & Johnson*, 776 F.2d 767, 770 (8th Cir. 1985) (concluding that the election of remedies doctrine did not apply because the fraud claim required a showing of fraudulent intent in inducing plaintiff to enter into purchase agreement, whereas the breach-of-contract claim required showing that defendants acted in bad faith after the parties entered into the agreement).

The election-of-remedies doctrine does not apply here. As noted above, fraud is a claim, not a remedy. *See U.S. Installment Realty Co. v. De Lancy Co.*, 152 Minn. 78, 82, 188 N.W. 212, 213 (1922) (discussing the various remedies for fraudulent inducement into a contract). Citing *U.S. Installment Realty*, appellants argue that Mulcahy disaffirmed the contract by seeking fraud damages because the "remedy for fraudulent inducement of the parties' contract is rescission." Appellants contend that Mulcahy cannot argue both for rescission of the contract and specific performance of the contract. However, in *U.S. Installment Realty*, the supreme court stated that, if a party has performed a contract "in whole or in part, before discovering the fraud, he may affirm the contract and sue for damages, or he may rescind the contract and recover what he parted with on returning what he received." *Id*. at 82-83, 188 N.W. at 214.

Mulcahy asserted alternative claims. The first was that he was induced to enter into the purchase agreement by appellants' misrepresentations regarding defeasance. If successful, Mulcahy sought, and would be entitled to, damages appropriate to that claim. If unsuccessful, however, Mulcahy sought a remedy expressly provided in the purchase agreement for breach of contract, namely specific performance. Because Mulcahy was not successful in litigating the fraud claim, he was entitled to pursue his principal claim of breach of contract and to the agreed remedy of specific performance.

Appellants appear to equate fraud with the failure to use "diligence" and "good faith." But the elements of fraud do not include a lack of "diligence" or "good faith." *See Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (stating the elements of fraud, which are: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce the other party to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that damages resulted from the reliance). Therefore, a finding that there was no fraud in the inducement does not preclude a determination that appellants failed to act with "diligence" and "good faith" in obtaining defeasance, as required by the purchase agreement.

Appellants contend that Mulcahy "couch[ed] his fraud claim as seeking only damages," and that he is not entitled to monetary damages because the purchase agreement does not provide for the remedy of money damages. But Mulcahy specifically pleaded fraud (not just damages) in his complaint, and proof of damages is essential to a fraud claim. *See id.* Furthermore, "[t]he law should not, and does, not permit a covenant of immunity to be drawn that will protect a person against his own fraud." *Ganley Bros., Inc. v. Butler Bros. Bldg. Co.*, 170 Minn. 373, 377, 212 N.W. 602, 603 (1927). The purchase agreement specifically provides for the remedy of specific performance, and as discussed below, monetary compensation for certain losses may accompany an award of specific performance. *See Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc.*, 268 Minn. 176, 193, 128 N.W.2d 334, 346 (1964) (awarding money payments to the prevailing party to equalize any losses resulting from the delay in performance of a contract).

The district court did not err in denying appellants' motion to apply the election-of-remedies doctrine.

Breach of contractual obligations

Appellants argue the district court's conclusion that appellants did not "work diligently to pursue" defeasance of the property was not supported by the evidence and, as a matter of fact and law, appellants' conduct constituted a good-faith effort. Appellants do not specifically challenge any of the district court's findings of fact. Thus, on review, we determine whether the district court's findings support its conclusion that appellants breached their Section 5 obligations. *See Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002) (stating that this court accords the district court discretion in its ultimate conclusions that are not purely issues of law), *review denied* (Minn. June 26, 2002).

Appellants contend that they offered substantial evidence of their good faith and diligent efforts to pursue defeasance of the Cahill prior to the closing date, pointing to the following facts to support their contention: they made proposals to three financial institutions; they retained an agent, Steven Hoyt, to facilitate the defeasance; they sought to package properties in other pools to support Pool D when they realized that the Pool D properties were not sufficient to support defeasance; and they accepted a loan proposal from Associated Bank and proceeded toward closing that transaction until Associated Bank notified them that it would not be able to make the loan because of external regulatory issues.

Although appellants urge that they accepted a loan proposal from Associated Bank, Associated Bank never made a loan commitment to appellants, and the bank's loan committee never approved a loan to appellants. Furthermore, after it became clear that Associated Bank was not prepared to lend money to appellants, they never returned to NorthMarq to see whether they could still obtain a loan there, nor did they make any other efforts to achieve defeasance. Also, appellants never sought a loan solely to defease the Pool D mortgage. Ultimately, appellants chose not to defease Pool D properties because they deemed the defeasance costs too high. Because the purchase agreement contained no financing contingency comparable to that provided for Mulcahy, appellants bore the risk of having to perform the agreement despite high defeasance costs.

Appellants further assert that the district court improperly focused on whether Steven Hoyt stood to benefit from any of the respective banks' proposals rather than on the efforts of appellants to accomplish defeasance. However, the district court's finding that Hoyt stood to benefit from the Associated Bank proposal also supported its conclusion that appellants did not act in good faith. Regardless of whether Hoyt stood to benefit from the Associated Bank proposal, the evidence shows that Hoyt ignored NorthMarq's binding loan proposal and its willingness to close the loan, and instead pursued a preliminary non-binding proposal from Associated Bank. This uncontroverted evidence supports the conclusion that appellants did not act with due diligence.

The unchallenged facts support the district court's conclusion that appellants did not act with the requisite diligence and good faith to achieve defeasance under the agreement. The district court did not err in concluding that appellants had breached their contractual obligations or in ordering specific performance.

Conveying the property without an exception for the mortgage

Appellants argue that the district court erred in ordering conveyance of the Cahill to Mulcahy without an exception for the mortgage. They contend that, based on the language in Section 9 of the agreement, and because Mulcahy's attorney had objected to title encumbered by the mortgage, Mulcahy had "the option to either terminate the Agreement and receive a refund of his earnest money[,] or waive the Title Objections issued by his counsel and proceed to closing with all uncured Objections being deemed Permitted Encumbrances." The purchase agreement provided, as Mulcahy's "sole and exclusive remedies" in the event appellants defaulted in performing their obligation under the contract, the following: waive appellants' contractual obligations and proceed to closing; extend the time for performance as mutually agreed upon by the parties; prior to appellants curing such a default; terminate the agreement; or enforce specific performance of the agreement.

The district court determined the language in Section 9 of the agreement concerning title evidence, title insurance and title objection, was largely a boilerplate provision. The district court further concluded that the specific default provisions, such as Section 5 of the purchase agreement, apply and that Mulcahy is entitled to receive a limited warranty deed without an exception for the mortgage. Furthermore, the plain language of Section 9 also contemplates that appellants would satisfy all mortgages, liens and the like at the time of closing, thus supporting the district court's conclusion that the agreement does not require Mulcahy to accept the property subject to a mortgage. Mulcahy contends that this conclusion fits the purpose of specific performance, which is "to put the parties in the positions they would have been in had the contract been performed." *Park-Lake Car Wash, Inc. v. Springer*, 394 N.W.2d 505, 512 (Minn. App. 1986).

In reaching its conclusion about a conveyance without an exception for the mortgage, the district court seemed to rely entirely on the language of the purchase agreement, and not on external facts or evidence. Therefore, our review of the district court's reading of the agreement is de novo. *See BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 903 (Minn. App. 2010) (stating that the interpretation of an unambiguous contract is a question of law, which is reviewed de novo), *review denied* (Minn. May 18, 2010). "In interpreting a contract, the language is to be given its plain and ordinary meaning." *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Contract constructions that would lead to an absurd result or render provisions meaningless should be avoided. *Id.* Contractual provisions containing specific terms control over general provisions. *Weiss v. City of St. Paul*, 211 Minn. 170, 174, 300 N.W. 795, 797 (1941).

We agree with the district court's reading of the agreement, as it appears to follow the canons of contract interpretation. Section 9 is largely general, boilerplate language applying to title evidence, and indicates that appellants would satisfy mortgages, liens and the like at the time of closing. Section 5 contains language that is specific to this particular purchase agreement, stating that if appellants do not complete defeasance prior to the closing date, the agreement "shall automatically terminate . . . unless [the parties] mutually agree in writing to extend the Closing Date." Section 5 says nothing about the parties agreeing to go forward with the transaction if defeasance is not completed. If Section 9 applied to the mortgage, Section 5 would be rendered meaningless, because appellants would then have a choice not to defease the mortgage, which is contrary to the requirement of Section 5, requiring appellants to exercise due diligence and good faith in procuring defeasance.

The agreement provides for specific performance as a possible remedy if appellants default in performing their obligations under the agreement. Appellants were required under the agreement to act with due diligence and good faith to procure defeasance. Mulcahy reasonably expected to obtain the Cahill unencumbered by the mortgage. Thus, the most reasonable reading of the agreement is that Mulcahy is entitled to specific performance such that appellants must convey the Cahill to him without an exception for the mortgage.

Application of specific performance compensation

Appellants argue that the district court erred in its computation of equitable compensation to which Mulcahy was entitled in relation to specific performance of the purchase agreement. As a remedy incident to the award of specific performance, the district court awarded Mulcahy an "equitable monetary offset," in the net amount of $308,536.88. The district court determined that the award of compensation was to operate as a credit against the purchase price of $4,000,000. Appellants contend that the district court's award of a credit against the purchase price was unreasonable, as specific performance compensation should reflect "the benefit that [Mulcahy] would have experienced if he had owned the Cahill building."

The district court based its equitable compensation award on *Indianhead*, 268 Minn. at 193, 128 N.W.2d at 346. In an action for specific performance, to compensate the prevailing party for the delay in performance, the court "equalizes any losses occasioned by the delay [in performance] by offsetting them with money payments." *Id*. In *Indianhead*, the court allowed the plaintiff to obtain expenditures flowing from "efforts seeking consummation of the contract." *Id*. at 195, 128 N.W.2d at 348.

Appellants do not seem to challenge the district court's application of the basic premise of *Indianhead*; that is, that Mulcahy is entitled to compensation. Rather, appellants challenge the amount of the equitable monetary offset the district court awarded. Appellants argue that the evidence does not support the district court's finding that gross revenue is the equivalent of net profit, because Mulcahy's theory, that net rent paid by the tenants took into account all expenditures in connection with the operation of the building, is flawed.

At trial, each party offered expert testimony to address the amount of the equitable monetary offset. Hoyt testified as appellants' expert. Based on the terms of the written leases with the existing tenants at the Cahill, Mulcahy's expert testified to a calculation of the rents Mulcahy would have received from the existing tenants in the Cahill from December 2007 through February 1, 2009. Mulcahy's expert explained that the majority of expenses for the Cahill are passed through to the tenants.

Appellants assert that certain tenant leases show operating expenses include numerous major expenses that are the sole responsibility of the landlord, rendering Mulcahy's position that all expenses are passed through to tenants factually incorrect. Sometime after trial, appellants submitted documents identified as Income Statements of the Cahill for 2008 and 2009, which showed that the Cahill had lost $89,904.11 during 2009. At trial, Hoyt testified that the net income for the Cahill in 2008 was $186,000. But the purported 2008 Income Statement, which does not identify any expenses for interest payments to the bank, lists the net income as $131,199.11. Moreover, the Income Statements list certain items as landlord expenses, such as insurance, real-estate taxes, roof repair, parking-lot maintenance, etc. However, the tenant leases provide that all of the items appellants point to are operating expenses that the Cahill tenants were required to pay.

This same evidence was before the district court, and the court made appropriate credibility determinations based on the documents and expert testimony introduced at trial. We defer to the district court's credibility determinations and resolution of conflicting evidence. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). There was ample, credible evidence to support the district court's computation of equitable compensation.

Appellants argue that a further comparison of *Indianhead* to the facts of this matter is warranted. Appellants highlight the fact that that the supreme court in *Indianhead* reversed part of the district court's award of damages for lost profits based on savings and operating costs as "so demonstrably speculative and remote" that the amount could not represent the "legally deducible consequences of [defendant]'s failure to perform the agreement." *Indianhead*, 268 Minn. at 196, 128 N.W.2d at 348. However, appellants fail to note in their analysis of *Indianhead* that the questionable amount in that matter was attributed to "estimated operating profits [plaintiff] would have earned by eliminating duplicating costs . . . ." *Id.* at 181, 128 N.W. 2d at 339. The supreme court reversed only as to this particular amount; it affirmed as to the amounts representing other, less speculative "operating profits," such as "net gain realized by [plaintiff] on the sale of certain assets subject to the agreement." *Id.*

There is evidence to support Mulcahy's calculations of an equitable monetary offset that was not speculative and remote. The district court did not abuse its discretion in awarding Mulcahy $308,536.88 in compensation for the time period from January 14, 2008, to November 6, 2009.

The effect of the jury's verdict for the fraudulent misrepresentation claim

Appellants argue that the district court, in making its determination that appellants did not "work diligently to pursue" and did not use "good faith efforts to achieve" defeasance of the Cahill, erroneously relied on some of the "operative facts" found by the jury on the fraud claim, while ignoring the jury's verdict. When a case involves both claims at law and claims for equitable relief, any essential factual issues that are common to both must be first tried to a jury, and the court is bound by the jury's determination of factual issues common to both the legal and equitable claims. *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007). These factual findings include all findings that are explicit in or necessarily implied by the jury's verdict on the claims at law. *Id.* at 618. However, "[i]ssues of fact that are not submitted to the jury on the special verdict form are left to the district court to decide." *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 618 (Minn. 2008).

Appellants argue the jury's finding that appellants did not commit fraud meant the jury necessarily found that "the alleged lack of a financing contingency did not form a basis for fraud by misrepresentation under the Agreement, nor did Appellants [or their agents], act in an unethical or irresponsible manner under the Agreement." These are the "facts" that appellants allege were implicitly found by the jury, and that the district court then relied on in determining that appellants did not act with good faith or diligence as required under the agreement.

As noted above, the fraud claim and the contract claim were separate. Mulcahy pleaded fraud in the inducement as an alternative to a claim of breach of contract, and argued at trial that appellants misrepresented that they had the financial capability to ensure conveyance of the Cahill to him free from the mortgage. The jury found that no fraud had occurred. The district court determined an entirely different issue as to whether, *after* entering into the agreement with Mulcahy, appellants acted with due diligence and good faith to obtain the financing required to defease the mortgage. Whether appellants acted in "an unethical or irresponsible manner" at the outset of the agreement was not determinative of whether appellants acted with "due diligence" or "in good faith" in attempting to defease the mortgage.

Furthermore, here, as in *Milner*, no questions were submitted on the jury's special verdict form about appellants' performance under Section 5 of the agreement. The jury answered "no" to the question, "Did [appellants] commit fraud by misrepresentation?" and thus, did not answer the question, "What amount of damages is [Mulcahy] entitled to as a result of [appellants'] fraudulent misrepresentation?" Therefore, no issues regarding appellants' performance under Section 5 of the agreement were submitted to the jury, making any issues regarding that performance within the trial court's exclusive authority to decide. The jury had no reason to consider appellants' "diligence" or "good faith efforts" to defease *after* the agreement was executed, because the claim of fraudulent misrepresentation only affected the parties' entrance into the contract.

The jury's verdict did not bind the district court in making its determination as to whether Mulcahy was entitled to specific performance based on appellants' actions.

Assignment of an actual monetary award to respondent

Mulcahy argues that, in addition to the judgment for specific performance, he should have been awarded a monetary judgment for the compensation of $308,536.88, rather than an offset against the purchase price. He contends that "[b]y failing to enter a monetary judgment against Appellants, the trial court failed to grant [him] the 'full measure of relief' required in equitable actions." Mulcahy's main concern is that by crediting the compensation award against the purchase price of the Cahill, he will not have means to recover the compensation award if appellants fail to comply with the specific performance judgment or lose the property to foreclosure.

There has been no showing that the appellants will not comply with the district court's order for specific performance. Mulcahy's assertion in this regard is speculative at this point. Furthermore, there are remedies for a party's failure to obey a court order and those are properly addressed in the district court.

Nevertheless, we construe the equitable offset to be a constructive trust on the net proceeds being collected on the property beginning on January 14, 2008, the point at which the district court determined that amounts of offset must begin to be calculated. An implied constructive trust makes the award of an equitable offset an effective remedy, subject to control and refinement by further order of the district court.

Affirmed.