STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0778

Magnum Real Estate Services, Inc.,
Respondent,

vs.

Starbound St. Paul Hotel, LLC,
Appellant,

Land Title, Inc.,
Defendant.

Filed December 16, 2013
Affirmed; motion denied
Kalitowski, Judge

Ramsey County District Court
File No. 62-CV-11-10062

Louise A. Behrendt, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for respondent)

Stephen M. Harris, Meyer & Njus, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

KALITOWSKI, Judge

Appellant Starbound St. Paul Hotel argues that the district court erred in granting summary judgment to respondent Magnum Real Estate Services on its breach-of-contract

and promissory-estoppel claims, and in granting respondent's request for attorney fees. We affirm.

D E C I S I O N

I.

Appellant contends that the district court erred by granting respondent's motion for summary judgment on its claim that appellant breached the parties' contract regarding the division of earnest money deposits. We disagree.

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). "We review a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the reviewing court must 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).

Appellant and respondent entered into a listing agreement in which respondent became the exclusive listing agent for the property appellant wanted to sell. The listing agreement provided that, "[i]f [the purchaser of the property] fails to perform and forfeits its earnest money deposit, fifty (50%) percent of the deposit will be paid to [respondent]." Appellant subsequently entered into a purchase agreement with TOTI Development, which provided that TOTI would deposit $20,000 earnest money in escrow. The purchase agreement was amended four times, and each amendment contained a provision

calling for an additional earnest money payment to be made directly to appellant. The sale never took place, and TOTI forfeited all its earnest money. Appellant agrees that respondent is entitled to half of the earnest money paid pursuant to the original purchase agreement. But appellant argues that respondent is not entitled to the earnest money funds given by TOTI to appellant under the amendments because those funds, while called "earnest money," did not function as such.

Because this summary judgment decision involves interpretation of the listing agreement between appellant and respondent, the threshold inquiry is whether that agreement is ambiguous. "The construction and effect of a contract is . . . a question of law unless the contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "Whether a contract is ambiguous is a question of law that we review de novo." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). We conclude that the listing agreement is not ambiguous. Its plain language provides that appellant will pay respondent 50% of all forfeited earnest money. The contract does not distinguish between earnest money deposited in escrow and earnest money given directly to appellant.

Because the language of the listing agreement is not ambiguous, we review the agreement de novo. *Denelsbeck*, 666 N.W.2d at 346. "The primary goal of contract interpretation is to determine and enforce the intent of the parties." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). "[W]hen a contract is

unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, unambiguous terms are conclusive of that intent." *Knudsen v. Transport Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Feb. 25, 2004).

The listing agreement entitles respondent to 50% of forfeited earnest money. Although appellant argues that the term "earnest money" used in the amendments was intended to compensate appellant for TOTI's delay in closing, not to function as earnest money as the term is ordinarily used, the amendments do not say that. If appellant wanted those sums to function as something other than earnest money, appellant should not have referred to them in the amendments as "earnest money." Appellant had an agreement with respondent that entitled respondent to half of all forfeited earnest money, and appellant included earnest money payments in its purchase agreement and amendments with TOTI. Therefore, the district court properly determined that respondent is entitled to half of the money TOTI paid to appellant as earnest money.

Because the language of the listing agreement is not ambiguous and entitles respondent to 50% of forfeited earnest money, the district court did not err in granting summary judgment to respondent on its breach-of-contract claim.

II.

Appellant argues that the district court erred in granting respondent's motion for summary judgment on its promissory-estoppel claim. We disagree.

Promissory Estoppel Claim

In addition to acting as appellant's real estate broker, the record indicates that respondent's principal also assisted appellant in applying for, and successfully acquiring, several grants to improve the property. Respondent assisted appellant in obtaining a Metropolitan Council Tax Base Revitalization Account (TBRA) grant and two STAR grants. The district court found that respondent was properly due compensation for its grant-assistance work under a theory of promissory estoppel. Pursuant to promises made by appellant, the court determined that respondent was due compensation in the amount of 20% of the funds appellant received through the TBRA grant and 40% of 40% of the funds appellant received through the STAR grants. Neither party disputes that respondent assisted with the grant-writing process and that the grants were awarded to appellant.

Appellant contends that disputed genuine issues of material fact preclude summary judgment on this claim. Respondent asserts that, because appellant failed to argue to the district court that fact questions precluded a grant of summary judgment, appellant has waived the issue. We agree.

In making a cross-motion for summary judgment, appellant asserted that there were no disputed issues of material fact. Moreover, in its submission to the district court, appellant's response to respondent's motion for summary judgment was that respondent was not entitled to receive compensation regarding the grant money because absent a written agreement, Minnesota statutes preclude real estate brokers from recovering compensation.

A party may not raise a new theory on appeal to seek reversal of an issue decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). In its order, the district court noted that "[t]he [p]arties . . . are of the understanding that no genuine issue of material fact exists to be tried." Moreover, in denying appellant's post trial motion the district court determined that because appellant "had ample opportunity to argue the presence of fact issues and failed to successfully do so," the argument was waived. We agree. Appellant's argument that genuine issues of material fact preclude summary judgment is not properly before this court.

Appellant's Statutory Argument

Appellant argued in district court that Minnesota statutes prohibit a real estate broker's recovery in quasi-contract. Appellant relied on the statute that regulates real estate brokers, which provides:

> No person required by this chapter to be licensed shall be entitled to or may bring or maintain any action in the courts for any commission, fee or other compensation with respect to the purchase, sale, lease or other disposition or conveyance of real property, or with respect to the negotiation or attempt to negotiate any sale, lease or other disposition or conveyance of real property unless there is a written agreement with the person to be licensed.

Minn. Stat. § 82.85, subd. 2 (2012). In addition, appellant points to Minn. Stat. § 82.66, subd. 1(b)(4) (2012), which states that "[a]ll listing agreements must be in writing and must include . . . (4) the amount of any compensation or commission or the basis for computing the commission[.]"

Appellant argues that, because respondent's principal is a real estate broker and because Minnesota statutes require contracts with real estate brokers to be in writing, respondent cannot recover compensation for its grant-assistance work under a theory of promissory estoppel. We disagree. Educational training in grant writing is not required to obtain a broker's license. *See* Minn. Stat. § 82.60 (2012) (providing a detailed outline of educational requirements required to become a real estate broker or salesperson). And no statute requires licensure in order to apply for the type of grants at issue here. Thus, Minn. Stat. § 82.85 does not apply to respondent's grant-writing work. We conclude that the district court properly determined that the agreement for respondent to assist appellant in acquiring grants was a separate agreement outside the scope of the listing agreement, and outside of respondent's duties as a real estate broker. Therefore, Minnesota law does not preclude respondent's promissory-estoppel claim.

Respondent's Motion to Strike

Respondent moved to strike a supplemental appendix submitted with appellant's reply brief because the material was not part of the district court record. That material pertains to appellant's argument that genuine issues of material fact preclude summary judgment on respondent's promissory-estoppel claim. Because appellant's argument is not properly before us, we deny respondent's motion as moot.

III.

Finally, appellant argues that the district court erred in awarding attorney fees to respondent because the listing agreement between appellant and respondent only

provided for the recovery of collection costs if appellant failed to pay a brokerage fee. We disagree.

"We review the district court's award of attorney fees or costs for abuse of discretion." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). "The American rule [of fee allocation] prevents a party from shifting its attorney fees to its adversary without a specific contract or statutory authorization." *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998). Here, because no statute authorizes attorney fees, we must determine whether the listing agreement requires appellant to pay respondent's attorney fees.

The listing agreement states that, "[i]f [appellant] fails to pay the brokerage fee, [appellant] will pay [respondent]'s collection costs to include court costs, attorney's fees and 12% interest from the date due." And in the sentence immediately preceding this language, the listing agreement specifies appellant's obligation to pay respondent half of the earnest money if purchaser fails to perform. There was no brokerage fee because the prospective transaction never occurred, but appellant failed to pay respondent the full amount of earnest money due under the listing agreement. We conclude that the listing agreement established appellant's responsibility to pay attorney fees if respondent was required to go to court to obtain money owed under the listing agreement. The district court properly determined that attorney fees were due to respondent.

Appellant also argues that the district court abused its discretion in the amount of attorney fees it awarded because some of respondent's claims were dismissed and some related to work outside the scope of the listing agreement. The district court considered

appellant's arguments and concluded that $25,000 of the $50,083.39 requested by respondent was the appropriate amount of attorney fees to award. On this record, we cannot say the district court's decision was an abuse of discretion.

Affirmed; motion denied.