STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1918

Cambridge Commercial Realty, Inc.,
Appellant,

vs.

Brooklyn Hotel Partners, LLC,
Respondent.

Filed March 31, 2014
Affirmed
Crippen, Judge[*]

St. Louis County District Court
File No. 69DU-CV-12-2463

John H. Bray, Maki and Overom, Ltd., Duluth, Minnesota (for appellant)

David L. Tilden, Hanft Fride, P.A., Duluth, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

CRIPPEN, Judge

Appellant challenges the district court's summary judgment that its claim for real-estate commissions is defeated under the statute that requires agreements of this kind to be in writing. We affirm.

FACTS

Appellant Cambridge Commercial Realty, Inc., is in the business of assisting third parties with various commercial real-estate transactions. One of appellant's former real-estate agents helped negotiate a transaction between the city of Brooklyn Center and respondent Brooklyn Hotel Partners, LLC. As part of the transaction, the city agreed to transfer land it owned to respondent, and in exchange respondent agreed to develop two hotels on the land.

Appellant claims that there were three different fee agreements for its agent's services. Under the parties' initial agreement, appellant was to receive 10% equity and 25% of the annual management fees from the property. The second fee agreement provided for $1.5 million in fees. Appellant claims that the parties later modified this fee agreement for a third time, agreeing on $500,000 in fees; this is the agreement that forms the basis for appellant's current claim. Appellant then contends that due to respondent's financial hardship, the parties verbally altered the $500,000 agreement, reducing it to $400,000. Respondent paid appellant $250,000 at closing.

Appellant instituted suit, claiming that respondent failed to pay $150,000 in commission. Respondent filed a motion for summary judgment, asserting that under

Minnesota statute an agreement of this kind must be in writing. To rebut summary judgment, appellant offered the affidavit of its former agent. The affidavit stated that a written fee agreement had been executed by both parties. The affidavit also stated that the agent gave the agreement to appellant's former record keeper, but that a copy of the agreement could not currently be located. Respondent denies ever signing the alleged agreement.

The district court determined that appellant failed to establish that a written agreement existed. It granted summary judgment, reasoning that appellant had merely offered self-serving assertions that there was a written agreement, which were weakened by its failure to describe when and in what fashion the signing occurred, or what efforts had been made to locate the alleged agreement.

D E C I S I O N

On appeal, appellant argues that the district court erred by determining that as a matter of law a written agreement between the parties did not exist. He also questions the district court's judgment refusing recovery on the occasion of full performance and determining that the transaction was not a business-opportunity transaction outside the statutory writing requirement.

A motion for summary judgment is granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "We review a district court's summary judgment decision de novo. In doing so, we determine whether the district

court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). We are to "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).

The district court granted summary judgment based on its determination that Minn. Stat. § 82.85, subd. 2 (2012), precluded appellant's recovery. The statute 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 required to be licensed.

Minn. Stat. § 82.85, subd. 2. "The intent of the statute is to protect innocent persons from unethical or overreaching conduct by real estate brokers." *Teachout v. Wilson*, 376 N.W.2d 460, 464 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985). We have held that this statute is to be strictly construed. *Id.*

Existence of a Written Agreement

Appellant argues that genuine issues of fact remain as to the existence of the parties' written agreement. Appellant claims that a written agreement once existed, but is now lost. But "the party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[M]ere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Osborne v.*

Twin Town Bowl, Inc., 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). And appellant's assertions are weakened by its lack of additional evidence showing how the document was lost or any efforts made to recover it. Appellant asserts that the document was given to the record keeper, but there is nothing in the record regarding appellant's efforts to locate the record keeper or explain the absence of its own business records. No evidence is given either explaining why the city or others do not have a copy of the agreement or why such a copy was not recovered.

To establish that a written agreement existed, appellant submitted invoices; emails; a copy of an earlier, unsigned agreement between the parties; and the development agreement between respondent and the city. The invoices submitted indicated that respondent owes appellant $150,000 in fees; the emails show that respondent had acknowledged its $150,000 debt to appellant. But this evidence may be explained by an oral agreement of the parties that does not satisfy the requirements of Minn. Stat. § 82.85, subd. 2. The parties' earlier, unsigned agreement is similarly unavailing. Appellant argues that this agreement is the same format as the one the parties allegedly signed but cannot now produce. Yet this agreement is unsigned and states that $1.5 million in commission is owed, which is not the amount currently in dispute. Finally, appellant points to the development agreement, which states that respondent had retained appellant as its realtor and agreed to pay commissions owed. The development agreement, which is between the city and respondent, fails to show that a written agreement between the parties was executed and fails to indicate the amount of commission owed to appellant.

We further reject appellant's argument that Minn. R. Evid. 1004 precludes summary judgment. Under Minn. R. Evid. 1004, the contents of a writing can be proven by secondary evidence when the writing is lost or destroyed. But Minn. R. Evid. 1004 only applies when the parties agree that there was a writing at one point and when the loss of the writing is established by competent evidence. Here, respondent denies the existence of the writing, and as discussed, appellant has not adequately shown that the agreement was ever reduced to writing.

"Business-Opportunity" Exception

Next, appellant argues that summary judgment was improperly granted because it was engaged in a "business opportunity" under Minn. Stat. § 82.56(m) (2012) that is excepted from the writing requirement of section 82.85, subdivision 2. Normally, a "real estate broker" is any person who negotiates the sale or purchase of real estate or negotiates the sale of a "business opportunity or business" for another for a commission. Minn. Stat. § 82.55, subd. 19(a), (d) (2012). But under Minn. Stat. § 82.56(m), the term "real estate broker" does not include an agent licensed under chapter 80A who "participat[es] in a transaction in which all or part of a business opportunity or business, including any interest therein, is conveyed or acquired pursuant to an asset purchase, merger, exchange of securities, or other business combination . . . ."

The interpretation of a statute is a question of law subject to de novo review. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). When interpreting the meaning of the statute, the court must first look to whether the statutory language is clear

on its face. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010). If it is clear and unambiguous, the court must rely on the plain meaning of the statute. *Id.*

The record indicates that appellant's agent approached respondent with an opportunity to develop hotels on the city's property. But the only evidence that appellant's agent was licensed under Chapter 80A or that this transaction involved a business-opportunity sale is the agent's affidavit. Self-serving affidavits are not sufficient to create an issue of fact for trial. *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffen*, 778 N.W.2d 380, 388 (Minn. App. 2010), *review denied* (Minn. Apr. 28, 2010).

Moreover, insofar as this transaction involved a business opportunity, it is undisputed that the transaction chiefly involved the sale of real estate. Except only as the agent asserts his authority for a business-opportunity transaction, the record consistently reflects that it acted as a real-estate broker with regard to this transaction. Appellant, a commercial realty business, admitted to negotiating a deal between the city and respondent, and the development agreement between the city and respondent stated that the transaction involved the "Purchase and Sale of Development Property."

Because the dispute arose from the sale of property, the district court correctly concluded that the statutory requirement set forth in section 82.85, subdivision 2, was not defeated by the exception listed in section 82.56(m).

Appellant's Full Performance

Finally, appellant argues that it fully performed its duties under the parties' agreement, justifying payment of its remaining commission. For this argument appellant relies on *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 325-26 (Minn.

2004) (observing precedents holding that a statute of frauds may be superseded by the parties' performance). But *Rosenberg* is a case regarding the issue of substantial compliance. In *Rosenberg*, there was no question as to the existence of a written agreement. *Id.* at 325. The only question was whether the written agreement was adequate in form. *See id.* at 324 (discussing whether the parties' written agreement complied with Minn. Stat. § 82.195 (2002), currently numbered Minn. Stat. § 82.66, subd. 1 (2012), requiring that listing agreements contain certain "contents" to be enforceable).

Also, other authority that has directly addressed the question has determined that the statutory purpose of requiring a written agreement would be defeated if a broker could recover compensation under equitable theories. *Krogness v. Best Buy Co., Inc.*, 524 N.W.2d 282, 286-87 (Minn. App. 1994), *review denied* (Minn. Jan. 25, 1995). The Restatement of Contracts provides further support, stating the consequence of a statutory writing requirement in the context of the sale of a business opportunity:

> A orally promises to pay B a commission for services in negotiating the sale of a business opportunity, and B finds a purchaser to whom A sells the business opportunity. A statute extends the Statute of Frauds to such promises, and is interpreted to preclude recovery of the reasonable value of such services. The promise is not made enforceable by B's reliance on it.

Restatement (Second) of Contracts § 139 cmt. c illus. 3 (1979).

Finally, the *Rosenberg* decision is not authority on the questions of whether Minn. Stat. § 82.85, subd. 2, is a statute of frauds or whether performance overcomes the absence of a writing. This subdivision specifically determines the impropriety of

lawsuits for a broker's commission when no writing exists, a subject that by implication regularly involves commissions claimed for sale transactions already completed. In other words, this appears to be a unique statute of frauds. It contemplates performance agreements and requires them to be in writing.

The statute mandates that without a written commission agreement appellant cannot prevail against respondent. Because appellant has not proven the existence of a written agreement, respondent is entitled to summary judgment.

Affirmed.