Filed in District Court

State of Minnesota

September 8, 2020

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF OTTER TAIL SEVENTH JUDICIAL DISTRICT

Cecilie Schumacher-Cookman,
DuWayne Cookman,

Plaintiffs,

vs.

Lorene Schumacher,

Defendant.

ORDER AND MEMORANDUM GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

Court File No. 56-CV-18-1954

On June 19, 2020, the above-entitled matter came on for hearing before the undersigned Judge of District Court, at the Otter Tail County Courthouse in Fergus Falls, Minnesota, via remote technology, on Defendants' Motion for Summary Judgment. Attorney Ryan Fullerton appeared on behalf of Plaintiffs. Attorney Brian Toay appeared on behalf of Defendant. The parties each submitted briefs and affidavits to support their arguments. The parties also orally argued their positions at the hearing.

Based upon the entire file, the applicable law, the arguments of the parties, and for the reasoning set forth in the attached Memorandum, IT IS HEREBY ORDERED THAT:

1. Defendants' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.
2. Defendant's motion for summary judgment as to Plaintiffs' claims for Breach of Contract, Promissory Estoppel, and Unjust Enrichment is hereby **DENIED.**
3. Defendant's motion for summary judgment as to Plaintiffs' claims for Fraud and Negligent Misrepresentation is hereby **GRANTED.**

4. Notwithstanding the above, the Court declines to enter a final judgment as to fewer than all claims, pursuant to Minn. R. Civ. P. 54.02.

5. The attached Memorandum is incorporated by reference herein.

Dated: 9/8/20

BY THE COURT:

Kevin M. Miller
Judge of District Court

Memorandum

Factual and Procedural Background

Plaintiff Ceclie Schumacher-Cookman is Defendant's daughter and is married to Plaintiff DuWayne Cookman. Defendant Lorene Schumacher owns 7.68 acres of lake front property on Rose Lake in Otter Tail County, Minnesota (hereinafter "the subject property").[1] Defendant and her husband purchased the property in 1973 and the property holds great sentimental value for the family members. In 1997, Defendant gathered her five children at her home and asked if any of them would be interested in being given a lake lot that would be subdivided from the Subject Property. Cecilie Schumacher-Cookman, Curt Schumacher, and Charles Schumacher all expressed interest in owning part of the subject property. The other children remember the conversation, but did not express an interest in obtaining any part of the lake property. Plaintiffs claim that Defendant offered to give acreage to any of the children who would build on it.

Over the next year, the parties discussed the subdivision of the property. In the winter of 1997, Plaintiff DuWayne Cookman and Defendant discussed Plaintiffs building a garage/cabin structure on the subject property. According to Curt Schumacher, during the conversation Defendant remarked that if a garage were built on the property that would mean that she would

[1] Prior to the 2013 survey Defendant and her family believed that she owned approximately 10 acres of land on Rose Lake.

own the garage. At the time of the discussion, the property had not been subdivided and Plaintiffs knew that they did not own the land that they were building on. Plaintiffs began construction in June of 1998 and finished construction in 2001.

In 1998, Defendant went to a County Variance Board meeting to request a variance to build the garage within a certain amount of feet to the lake, the variance was granted. On August 13, 1998, Defendant applied for another variance to allow her property to be subdivided. On the same day, Defendant purchased a building permit to construct the garage.

Defendant appeared before the variance board on September 10, 1998 and on October 8, 1998. The variance ultimately could not be granted because of issues with the access road. The access road would need to be deeded to the county before subdivision could occur but Defendant did not own the access road and therefore, was unable to deed it to the county. Defendant claims that Plaintiffs were aware that Defendant was unable to subdivide the property and that the variance had not been granted. Plaintiffs claim that they did not become aware of the variance issue until 2016 or 2017. No part of the subject property was ever deeded to Plaintiffs or Defendant's other children. No written contract was ever entered into for sale of the property, but Plaintiff Cecilie Schumacher- Cookman claims that there was a deed purporting to convey the property to her. No such deed was ever recorded.

Charlene Nelson (Defendant's daughter) became Defendant's power of attorney in 2013. That same year, Defendant had a survey completed on the land to update an error that was previously unknown. Plaintiffs knew about this survey and in 2016, Plaintiff DuWayne Cookman contacted the surveyor to discuss subdividing the property. It was explained to Duwayne that the problem with the road still existed and subdivision would not be possible. In 2018, Defendant placed the property for sale.

Plaintiffs have utilized the garage on the property as a cabin every year since building it. Plaintiffs have contributed to property taxes on the subject property since the cabin was built.

Plaintiffs claim that the following facts are in dispute and preclude summary judgment:

1. Defendant stated in her deposition that none of the children were interested in a lake lot but later said that Plaintiffs were interested, but that she could not follow through because she was unable to subdivide the lot.

    a. Whether Plaintiff clearly and unequivocally promised to transfer land to Plaintiffs.

2. Whether a deed was drafted sometime between 1998 and the early 2000's.

3. Whether the variance was denied or whether Defendant abandoned the process.

4. Whether there was a promise; whether there was a meeting of the minds; whether Plaintiff's actions were in furtherance of the agreement.

    a. Any Damages and the appropriate remedy.

Legal Analysis

I. Summary Judgment

Plaintiff's brought this action alleging: (1) breach of contract; (2) promissory estoppel; (3) fraud; (4) unjust enrichment; and (5) negligent misrepresentation. Defendant Lorene Schumacher has brought a motion for summary judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure. Plaintiffs oppose the motion and claim that there are genuine issues of material fact that preclude summary judgment.

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MINN. R. CIV. P. 56.01; *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 753 (Minn. 2005). On Summary Judgment, it is improper for the court to weigh facts or determine the

credibility of affidavits and other evidence. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party bears the burden of showing the absence of an issue of material fact. *Stringer*, 705 N.W.2d at 754. A material fact is one whose resolution will affect the result or outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976); *Anderson*, 477 U.S. at 248. Affidavits supporting and opposing a motion for Summary Judgment must set forth facts as would be admissible in evidence. MINN. R. CIV. P. 56.05. "When deciding any summary-judgment motion, the district court must disregard hearsay evidence that would be inadmissible at trial." *In re Trusts A & B of Divine*, 672 N.W.2d 912, 921 (Minn. App. 2004).

If the moving party presents a prima facie case for Summary Judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific disputed facts that create a genuine issue of material fact for trial. MINN. R. CIV. P. 56.05; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). This demonstration requires more than resting on the averments or denials of the party's pleading. MINN. R. CIV. 56.05; *Stringer*, 705 N.W.2d at 753. In other words, "[s]peculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). The nonmoving party must demonstrate a genuine issue of material fact by presenting "substantial evidence" that creates more than "a metaphysical doubt as to a factual issue" and that is "sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." DLH, 566 N.W.2d at 70-71. Further, Summary Judgment is appropriate when a non-moving party fails to make a showing sufficient to establish the existence of an element essential to the party's case. *Bersch v. Rgnonti & Assocs.*, 584 N.W.2d 783, 786 (Minn. App. 1998).

1. Breach of Contract Claim

In order to sustain a claim for breach of contract, there must be underlying information showing that there ever was a contract. Defendant argues that there was never a contract and therefore, this claim must fail.

"The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Commercial Assocs., Inc.*, 712 N.W.2d at 782 (citing *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626–27 (Minn.1983)). Courts in Minnesota typically include performance of any conditions precedent as an element of a breach-of-contract claim, *e.g.*, *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011).

A condition precedent is an event, not certain to occur, which must occur before performance under a contract becomes due. Restatement (Second) of Contracts § 224 (1981), *quoted in Seman v. First State Bank of Eden Prairie*, 394 N.W.2d 557, 560 (Minn. App. 1986); *see also, e.g., Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989)(defining a condition precedent as "any fact or event, subsequent to the making of a contract, which must exist or occur before a duty of immediate performance arises under the contract"); *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1974); *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. App. 1989) ("When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs.").

A condition precedent is not the same thing as a contractual promise, which is a manifestation of intention to act or refrain from acting in a specified way. *E.g.*, Restatement (Second) of Contracts § 2 (1981). No special terms or particular code words are necessary to create a condition precedent, but there must be some "clear and unequivocal" language that

indicates the agreement, or its terms, are conditioned upon some event. *See Carl Bolander & Sons*, 215 N.W.2d at 476; *Mrozik Constr., Inc. v. Lovering Assocs., Inc.*, 461 N.W.2d 49, 52 (Minn. App. 1990) ("We hold here that a condition precedent will not be found absent unequivocal language."). *Comprehensive Care Corp. v. RehabCare Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996) (Phrases such as "if," "provided that," "when," "after," "as soon as," and "subject to" traditionally indicate conditions precedent as opposed to contractual promises. (citing *Standefer v. Thompson*, 939 F.2d 161, 164 (4th Cir. 1991)); *see also Aslakson v. Home Sav. Ass'n*, 416 N.W.2d 786, 789 (Minn. App. 1987) (finding a condition precedent when the contract used the term "contingent upon"); *451 Corp. v. Pension Sys. for Policemen & Firemen*, 310 N.W.2d 922, 923-24 (Minn. 1981)(finding a condition precedent when the contract used the term "subject to"); *Carl Bolander & Sons, Inc.*, 215 N.W.2d at 476 (finding a condition precedent when the contract used the term "assuming that"); *Nat'l Union Fire Ins.*, 446 N.W.2d at 413 (finding a condition precedent when the contract used the term "subject to").

A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant. *Briggs Transp. Co. v. Ranzenberger*, 299 Minn. 127, 129, 217 N.W.2d 198, 200 (1974); *Commercial Assocs., Inc.*, 712 N.W.2d at 782. Whether a contract exists generally is a question for the fact-finder. *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn.1992).

Analyzing the elements of a valid contract, there must first be an offer. Regardless of Defendant's intentions or any barriers to performance, it is undisputed that Defendant offered to give land to her children. Whether this was an offer to enter into a contract or merely an expression of a desire to give her children a gift is in dispute.

With regards to the element of acceptance, it is undisputed that Plaintiffs expressed interest in obtaining the property; thereby, accepting the offer.

The next element of consideration is disputed. Defendant's other children claim that this offer to give them land was simply a gift. Plaintiff claims that the gift was contingent on the recipient building on the land. If the finder of fact found Plaintiff's claim to be credible, then this exchange would likely qualify as consideration.

Perhaps the most disputed element is the issue of whether the contract was subject to a condition precedent. This element is subject to significant factual disputes.

There are conflicting reports regarding what exactly was said to the children about Defendant potentially giving them the land. The caselaw requires that there be a definite manifestation of the condition precedent and that this be shown through the words used. Here, depending on the affiant, Defendant said some variation of the following: (1) that she wanted to split up the lots and give to her children; or (2) that she wanted to give the children acreage of property if they would build on it.

The facts that would give rise to the formation of a contract are in dispute and whether Defendant breached the contract will be contingent on the fact finders determinations concerning the prior elements.

a. Statute of Limitations

Defendant argues that Plaintiffs' claims implicate the six year statute of limitations. However, Plaintiff claims facts that may implicate equitable estoppel. Equitable estoppel would toll the statute of limitations. Due to this alleged factual dispute, the statute of limitations cannot be relied upon to grant summary judgment.

Conclusion

The Court is not permitted to make credibility determinations at this stage in the proceedings. Based on the information that the Court is permitted to consider, there are facts in dispute that preclude summary judgment on this claim.

2. Promissory Estoppel

Minnesota Courts have found that promissory estoppel is a creature of equity. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn.1995). The "application of promissory estoppel requires the analysis of three elements: (1) Was there a clear and definite promise? (2) Did the promisor intend to induce reliance, and did such reliance occur? (3) Must the promise be enforced to prevent injustice?" *Id; Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn.2000).

Looking at the three elements more closely, the Minnesota Supreme Court has called upon contract principles and held that a promise must be "clear and definite" to trigger promissory estoppel analysis of its enforcement. *Faimon v. Winona State University,* 540 N.W.2d 879, 882 (Minn. Ct. App. 1995); quoting *Ruud v. Great Plains Supply,* 526 N.W.2d 369, 372 (Minn.1995).

Here, it is alleged that Defendant repeatedly told Plaintiffs that she wanted to give them a portion of her land. Plaintiffs, through their affidavits, claim that Defendant intended to give them the parcel of land that they built their cabin on and have been taking care of since 1998.

The next prong is reliance, "to recover on a promissory estoppel claim, appellant must also show that the promise is one that might reasonably induce the promisee's action or inaction." *Faimon v. Winona State University,* 540 N.W.2d 879, 882 (Minn. Ct. App. 1995); quoting Restatement (Second) of Contracts § 90(1); *Cohen I,* 457 N.W.2d at 203–04 (citing Restatement). The reasonableness of Plaintiff's reliance is usually a question of fact for the jury.

Norwest Bank Minnesota, N.A. v. Midwestern Machinery Co., 481 N.W.2d 875, 880 (Minn.App.1992).

It is clear that Plaintiffs relied on Defendant's offer; they invested time and money to build a house on land that they did not own. However, the reasonableness of that reliance is a question that is better left to a finder of fact.

The third prong is injustice, "numerous considerations enter into a judicial determination of injustice, including the reasonableness of a promisee's reliance and a weighing of public policies in favor of both enforcing bargains and preventing unjust enrichment." *Faimon v. Winona State University*, 540 N.W.2d 879, 883 (Minn. Ct. App. 1995).

The potential injustice of this case would be that Plaintiffs would lose their investment in Defendant's property. They have invested both time and money to build the lake cabin and arguably it would be an injustice for them to lose that investment.

Looking to other public policy considerations, there is a strong public policy favoring timely assertion of rights. Plaintiffs have been aware for approximately two decades that this land was not able to be subdivided and that Defendant could not transfer the land to them and yet they waited until Defendant wanted to sell the property before asserting their rights, if any.

Conclusion

All three elements of this claim have some level of material factual dispute. Therefore, summary judgment is precluded on this claim.

3. Fraud and Misrepresentation Claim

Plaintiffs claim that there is a factual dispute precluding summary judgment on their claim of fraud, particularly when and if a promise to convey the land was made. Plaintiffs claim

that they could not have discovered the fraud until 2018 when the property was put on the market and therefore, the statute of limitations did not being to run until 2018.

"The 6-year fraud statute of limitations begins to run when the aggrieved party discovers the facts constituting the fraud." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 172 (Minn. 2012). The facts constituting the fraud are deemed to have been discovered when they were actually discovered or, "by reasonable diligence, should have been discovered." *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985).

Whether the presence of fraud tolls the statute of limitations is only legally relevant if there is information to support the fraud claim.

In *Hanson v. Ford Motor Co.* (8 Cir.) 278 F.2d 586, 591, the decisions of the Minnesota Supreme Court are carefully reviewed and the elements of fraud as defined by these decisions are accurately set out as follows:

1. There must be a representation;
2. That representation must be false;
3. It must have to do with a past or present fact;
4. That fact must be material;
5. It must be susceptible of knowledge;
6. The representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false;
7. The representer must intend to have the other person induced to act, or justified in acting upon it;
8. That person must be so induced to act or so justified in acting;
9. That person's action must be in reliance upon the representation;
10. That person must suffer damage;
11. That damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury. See also *Davis v. Re-Trac Mfg. Cor.*, 149 N.W.2d 37 (Minn. 1967).

Even when viewing the evidence in the light most favorable to the nonmoving party, there is scant evidence, if any, to support a claim of fraud in this case. The record is clear that Defendant said she wanted to subdivide her land and give parcels of it to her children but was unable to do so and told Plaintiffs as much. Plaintiffs were aware that a variance had not been granted and Defendant was unable to gift them the land. There is no indication that Defendant made any false representations with the intention of inducing Plaintiffs to act upon the representations. In fact, Plaintiffs built the garage knowing that the land had not been conveyed to them; knowing that the property had not been subdivided; and continued building after having been made aware that the property could not be subdivided.

Conclusion

Plaintiffs have failed to set forth facts to support each element of this claim; therefore, Defendant is entitled to summary judgment on this claim.

4. Unjust Enrichment

Plaintiffs allege that Defendant induced them to invest a considerable amount of money in Defendant's land, by building a cabin/garage on the property.

"In order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit." *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001); *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn.1996); *see also, Acton Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn.App.1986). It is not enough for the Plaintiffs to show that Defendant benefited from the efforts of Plaintiffs; Plaintiffs must show that Defendant was "unjustly

enriched in the sense that the term unjustly could mean illegally or unlawfully". *Schumacher* at 729. A cause of action for unjust enrichment may be based on 'situations where it would be morally wrong for one party to enrich himself at the expense of another. *Cady v. Bush,* 166 N.W.2d 358, 361-362 (Minn. 1969).

In *Anderson v. DeLisle,* 352 N.W.2d 794 (Minn. Ct. App. 1984), the Court of Appeals supported the finding that unjust enrichment had occurred where Plaintiff and Defendant entered into a contract for the sale of land; Plaintiff began to improve the land before the contract was finalized; and Defendants knew that Plaintiff was financially unable to perform his end of the contract and would default.

The principles of *Anderson* are reiterated in *Brakke v. Hilgers,* 374 N.W.2d 553 (Minn. Ct. App. 1985) (finding that the Plaintiff's claims did not indicate that Defendant plotted unfair advantage of the Plaintiffs or anticipated from the beginning that Plaintiffs would be able to meet their financial obligations.)

Conclusion

Whether Defendant has been unjustly enriched depends on which party one believes; a credibility determination is required to settle this claim and the Court is not permitted to make such a determination. There are facts in dispute and whether Defendant was unjustly enriched is a question that is better left to the finder of fact. Therefore, summary judgment is precluded on this claim.

5. Negligent Misrepresentation

Minnesota courts have adopted the definition of negligent misrepresentation set forth in Restatement (Second) Torts §552 (1976) which provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by the justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Bonhiver v. Graff*, 248 N.W.2d 291, 298 (Minn. 1976); *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 420 (Minn. App. 2003).

To establish a claim for negligent misrepresentation, a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant supplied false information to the plaintiff; (3) the plaintiff justifiably relied on that information; and (4) the defendant failed to exercise reasonable care in communicating the information. *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012).

Under general concepts of tort law, "duty" is defined as an "'obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' " *L & H Airco*, 446 N.W.2d 372, 378 (Minn. 1989) (quoting *Rasmussen v. Prudential Ins.*, 277 Minn. 266, 268, 152 N.W.2d 359, 362 (1967), which in turn quoted Prosser, Torts § 53 (3d ed. 1964)). The essential question in determining whether a defendant owes a duty is "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Safeco Ins. Co. of America v. Dain Bosworth Inc.*, 531 N.W.2d 861, 871 (Minn. Ct. App. 1995).

Minnesota courts have recognized that a duty of care exists in certain legal relationships such as accountant/client, attorney/client, and in some fiduciary relationships. A duty of care also exists in certain legal relationships where one person has superior knowledge or expertise. *Caritas Family Services*, 488 N.W.2d 282, 288 (Minn. 1992). There is no duty/liability when the parties are engaging in an arm's length commercial transaction. See *Safeco Ins. Co. of America v. Dain Bosworth Inc.*, 531 N.W.2d 861, 871 (Minn. Ct. App. 1995).

Conclusion

There is no indication that Defendant owed any duty to Plaintiffs because the parties were either engaging in an arm's length transaction for the transfer of real estate or Defendant was gifting Plaintiffs property. Establishing a duty is a base element for a claim of negligent misrepresentation. If Defendant did not owe Plaintiffs a duty of care, then there can be no claim. Therefore, Defendant is entitled to summary judgment on this claim.

Conclusion

Because the record reflects a genuine dispute of material fact with regard to three of the claims, the Court denies Defendant's motion for summary judgment as to those claims. Although Defendant is entitled to relief on the two undisputed claims, the Court declines to reduce that relief to a written judgment until the conclusion of this matter, when the Court will be able to issue a single judgment encompassing all relief that is ultimately obtained. For the foregoing reasons, summary judgment is **GRANTED** in part and **DENIED** in part.

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