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Court of Appeals of Minnesota.

M.W. JOHNSON CONSTRUCTION, INC., Respondent (A07-1752), Appellant (A07-2008),
v.
PROGRESS LAND COMPANY, INC., Appellant (A07-1752), Respondent (A07-2008).

Nos. A07-1752, A07-2008.
|
Aug. 5, 2008.
|
Review Denied Oct. 21, 2008.

West KeySummary

1 **Vendor and Purchaser**
Quantity or Extent of Land

The land purchased under the sale agreement could only be defined as the lineal feet of lot frontage rather than the number of actual lots. The parties could not contract for actual number of lots because it was subject to approval obtained from the city. The seller argued that the court failed to consider the parties' intentions at the time of formation.

Cases that cite this headnote

Dakota County District Court, File No. 19-C6-03-8969.

Attorneys and Law Firms

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Considered and decided by TOUSSAINT, Chief Judge; KALITOWSKI, Judge; and MUEHLBERG, Judge.

UNPUBLISHED OPINION

MUEHLBERG, Judge. *

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

***1** On the second appeal in this development dispute, seller argues that the district court (1) misconstrued two ambiguous purchase agreements for land undergoing development, and (2) erred in awarding damages to buyer for lost profits resulting from seller's breach of the second purchase agreement. Buyer argues that the district court erred (1) in not awarding lost-benefit-of-the-bargain damages in addition to damages for lost profits, and (2) by increasing the price of lots subject to the first purchase agreement based on evidence presented by seller after trial. We affirm.

FACTS

Meadow Creek (Farmington)
Progress Land Company, Inc. (seller) is a land-development company owned by Warren Israelson, and M.W. Johnson Construction Inc. (buyer) is a residential home-building company owned by Maurice William Johnson.

Seller owned about 160 acres of land in Farmington, which it planned to develop into a subdivision called Meadow Creek consisting of single-family units. On December 4, 2000, the parties entered into a purchase agreement that stated:

> **PURCHASE PRICE:** Buyer shall pay to seller as the purchase price for the property the sum of **($3,825,000.00) Three million eight hundred twenty five thousand dollars and no cents (60 proposed lots with 75 foot frontage (width) at $45,000.00 each and 30 proposed lots with 60 foot frontage (width) at $37,500.00 each).** It is possible that this price could change with addition or deletion of number of buildable lots.

The Meadow Creek property was originally zoned R-1 single-family residential, which requires lots with a frontage width of 75-feet. To build on 60-foot lots, the property would have had to be zoned R-2. Based on the city planner's representations that rezoning was unlikely to be approved, seller declined to apply for rezoning.

Johnson testified that the Meadow Creek purchase agreement was a contract for the sale of 6,300 feet of lineal-lot-front footage rather than a per lot sale of specific 60- and 75-foot lots. Johnson testified that the actual number of lots was to depend on the city's approval process. If the city approved additional 60-foot lots, the number of lots would increase, but if the city approved fewer, the number would decrease. Johnson believed that because rezoning was not obtained, seller was required to sell 24 additional 75-foot lots to equal the frontage of the 30 60-foot lots that were not approved. Israelson interpreted the Meadow Creek agreement as a contract for the sale of 60 proposed 75-foot lots and 30 proposed 60-foot lots, with the actual number of lots subject to change depending on whether rezoning was approved.

The parties closed on the sale of 35 75-foot lots in July 2002. The parties then closed on the additional 25 75-foot lots in November 2002, thereby completing the 75-foot lot portion of the agreement.

Rosewood (Rosemount)

In March 2001, seller purchased property in Rosemount, for which it planned a development called Rosewood, consisting of two subdivisions. Seller intended that the northern subdivision, Rosewood Village, would consist of lots for single-family homes and detached townhomes and the southern subdivision, Rosewood Estates, would consist solely of single-family lots.

***2** On September 4, 2001, the parties entered into a purchase agreement under which buyer would purchase 84 lots from respondent in Rosemount for $5,300,000 with no increase in purchase price if the number of lots increased. The Rosewood purchase agreement contained the following sections:

> **F. EARNEST MONEY:** To be deposited in the general account of the Seller. Earnest Money will be returned to Buyer, together with 8% interest per annum, if for any reason land cannot be developed during calender [sic] year 2002, in which event this agreement shall thereupon become null and void, except for the right of first refusal. Earnest money is non-refundable only in the event Buyer does not perform per the terms of this agreement.
>
> ....
>
> In the event ... proposed platting agenda dates are not met, the parties agree that this purchase agreement can be cancelled by mutual consent. Buyer shall have the right of first refusal if subject property is not completed until the year 2003.

Under the purchase agreement, seller was responsible, in a timely manner, for completing engineering and design work, building roads, providing utilities, and obtaining necessary approvals from the city. The earnest-money clause was included because seller requested it. Buyer requested the last paragraph regarding proposed platting and the cancellation of the agreement by mutual consent.

Israelson testified that the term "developed" means that development has progressed to the point where building permits will be issued. Johnson testified that the parties intended the term "developed" to mean "developable" and that the "null and void" language in the earnest-money clause would be triggered only if the government approval process was not completed in 2002. Johnson testified that if the government approval process was completed in 2002, the agreement could be cancelled only by mutual consent under the platting-agenda-contingency clause. Johnson testified that with only 16 months between execution of the purchase agreement and the end of 2002, it would have been virtually impossible to obtain all approvals and complete improvements for a minimum of 84 lots.

Seller obtained concept- and grading-plan approvals from the city in 2001 and 2002. Work on the project was suspended in December 2002 due to weather. At that time, the project had not yet reached the point at which building permits would be issued, and approval for the townhome lots had not yet been obtained.

In 2002, buyer entered into 22 individual presale contracts for the sale of single-family homes and townhomes in Rosewood Village. In the spring of 2003, seller offered buyer the option of purchasing the Rosewood property pursuant to the right of first refusal if buyer matched the price that another buyer was offering. Buyer refused. Following buyer's refusal, seller returned buyer's earnest money for the Rosewood purchase agreement, stating that the agreement was null and void.

***3** Johnson testified about lost profits resulting from seller's breach of the Rosewood agreement. Johnson testified that the lost opportunity to construct homes and townhomes in Rosewood Village represented lost sales volume because buyer had the ability to absorb additional projects at the time of the breach. Buyer had presold ten townhomes and 12 single-family homes in Rosewood Village. Johnson testified that the average price for a Rosewood Village townhome was $175,220 and the average price for a single-family home was $232,055. Johnson calculated the total sale price for 56 townhomes and 43 single-family homes at $18,213,705. To determine buyer's lost profits under the Rosewood agreement, Johnson multiplied $18,213,705 by buyer's average net profit margin from 2001 through 2005 of 9.456%, which equals $1,722,287.

Lawsuit

Buyer brought this action against seller, alleging that seller breached the Meadow Creek and Rosewood purchase agreements by failing to complete development and close on the sales. The district court granted seller's motion for summary judgment, dismissing buyer's breach-of-contract claims. The district court found that the language of the Meadow Creek purchase agreement was plain and unambiguous and that because the City of Farmington would not approve the 60-foot lots, seller did not violate the agreement. As to the Rosewood agreement, the district court found that it was null and void because the property was not developed in 2002. This court affirmed the dismissal of buyer's claim that seller breached the purchase agreement by failing to obtain approval for that project but reversed the dismissal of the remaining breach-of-contract claims based on its conclusions that both purchase agreements are ambiguous. *M.W. Johnson Constr., Inc. v. Progress Land Co.*, No. A04-2303, 2005 WL 1869679 (Minn.App. Aug.9, 2005).

On remand, following a court trial, the district court found that seller had breached both purchase agreements. The district court ordered specific performance of the Meadow Creek purchase agreement, directing seller to sell 24 Meadow Creek lots to buyer for $45,000 each, which equals a total price of $1,080,000. On the Rosewood purchase agreement, the district court awarded buyer $1,722,287 in damages for lost profits.

The district court granted in part seller's motion for amended findings (or a new trial), finding that buyer would receive a windfall if it acquired the 24 Meadow Creek lots for $45,000 each. The district court directed seller to provide documentation of additional costs incurred in developing the 24 Meadow Creek lots. The district court otherwise denied seller's motion and also denied buyer's motion for amended findings on damages. The district court amended the judgment to require buyer to pay $58,635.74 for each Meadow Creek lot, resulting in a total price of $1,407,257.76.

Seller appealed, challenging the district court's determinations that seller had breached the purchase agreements and the district court's calculation of lost-profits damages. Buyer filed a separate appeal, arguing that the district court erred by failing to award buyer lost-benefit-of-the-bargain damages for the Rosewood purchase agreement and challenging the amended determination of the cost of each Meadow Creek lot. This court ordered the appeals consolidated for decision.

DECISION

I.

***4** "[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn.2003). If a contract is ambiguous, its meaning is a question of fact, and extrinsic evidence may be considered. *City of Virginia v. Northland Office Properties Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn.App.1991), *review denied* (Minn. Apr. 18, 1991). A district court's findings of fact will not be overturned unless clearly erroneous. Minn. R. Civ. P. 52.01.

The district court found that the land purchased under the Meadow Creek agreement "could only be defined as 6,300 lineal feet of lot frontage ((60 x 75-ft) + (30 x 60-ft) = 6300 ft.) because the actual number of 60-foot and 75-foot lots that the land was to be divided into was uncertain" and that buyer "intended to purchase an entire piece of land with the actual number of certain lot sizes to be determined later," based on approvals obtained from the city. The district court explained:

> 31. Johnson's interpretation that [buyer] was buying 6,300 lineal feet of frontage is supported by the language of the Purchase Price provision of the Meadow Creek Purchase Agreement that states: "It is possible that this [purchase] price could change with addition or deletion of number of buildable lots." In other words, the number of 60-foot and 75-foot lots that were approved by Farmington impacted

> the total price [buyer] would pay [seller] because the per-lineal-foot price is different for each of the proposed lot sizes.
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> ....
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> 33.... [A]ssuming the parties contemplated the parcel of land as a whole is consistent with the wording of the Meadow Creek Agreement. The language "addition or deletion" leaves open the possibility of either more or fewer lots being platted. The only way to add to the number of lots to be purchased by [buyer] is for more 60-foot lots to be approved. The smaller the lots, the more there will be. [Seller's] interpretation leaves no possibility of the addition of lots.

In the previous appeal, this court determined that the Meadow Creek agreement was ambiguous as to whether it was a contract for the sale of 6,300 lineal feet or of 60 75-foot and 30 60-foot lots. *M.W. Johnson Constr., Inc. v. Progress Land Co.,* No. A04-2303, 2005 WL 1869679, at *4 (Minn.App. Aug.9, 2005). Accordingly, seller's argument that the district court's interpretation is contrary to the contract's plain language is precluded by the law-of-the-case doctrine. *See Sigurdson v. Isanti County,* 448 N.W.2d 62, 66 (Minn.1989) (explaining that law of the case prohibits a party from relitigating issues, either in district court or on a second appeal, after appellate court has decided and remanded for further proceedings on other matters).

Seller argues that the district court's interpretation unduly emphasized the sentence, "It is possible that this price could change with the addition or deletion of number of buildable lots." We disagree. As the district court found, only buyer's interpretation allows for the possibility of the addition of lots. Johnson's testimony indicates that the parties also contemplated that the city might approve more than 30 60-foot lots. Although Israelson testified to the contrary, we defer to the district court's credibility determinations. Minn. R. Civ. P. 52.01; *Sefkow v. Sefkow,* 427 N.W.2d 203, 210 (Minn.1988). The district court's interpretation is supported by the extrinsic evidence specifically relied on by the district court and by the rule that a contract is to be interpreted in a manner that gives meaning to all of its provisions. *See Brookfield Trade Ctr., Inc. v. County of Ramsey,* 584 N.W.2d 390, 394 (Minn.1998) (stating rule).

***5** Seller argues that the district court failed to consider the parties' intentions at the time the contract was formed. *See Ecolab, Inc. v. Gartland,* 537 N.W.2d 291, 295 (Minn.App.1995) (stating that court assesses parties' intent at time of contract formation). But Johnson's testimony addresses the parties' understandings at the time they entered into the Meadow Creek agreement.

Seller argues that buyer's conduct, during contract negotiation and performance, was inconsistent with the district court's interpretation. The factors cited by seller were for the district court to consider in making the factual determination of the meaning of the Meadow Creek agreement. This court defers to the district court's factual findings unless they are clearly erroneous, recognizing that the district court "has the advantage of hearing the testimony, assessing relative credibility of witnesses and acquiring a thorough understanding of the circumstances unique to the matter before it." *Hasnudeen v. Onan Corp.,* 552 N.W.2d 555, 557 (Minn.1996). Seller also argues that buyer's claim that the contract was for the sale of lineal front footage is inconsistent with its earlier position during this lawsuit. While buyer previously sought to compel seller to proceed with the permit-approval process for the 60-foot lots, that position is an alternative to, not inconsistent with, seeking specific performance of the sale based on lineal footage.

The district court's finding that the ambiguous Meadow Creek contract was for the sale of 6,300 lineal feet is supported by the evidence and not clearly erroneous.

II.

The district court determined:

> The Earnest Money paragraph of the Rosewood Purchase Agreement, which was drafted by [seller], states that: "Earnest money will be returned to buyer, together with 8% interest per annum, if for any reason land cannot be developed during calendar year 2002, in which event this Agreement shall thereupon become null and void, except for the right of first refusal." This sentence uses the phrase "land cannot be developed during the calendar year 2002." The phrase "cannot be developed" can just as easily refer to the possibility of development as it can to the completion of all improvements necessary for permits.

Applying the principle that contracts are to be construed against the drafter, the district court adopted buyer's construction of the earnest-money clause. *See Beattie v. Prod. Design & Eng'g, Inc.,* 293 Minn. 139, 149, 198 N.W.2d 139, 144 (1972) ("[W]e must construe a contract in a manner

designed to achieve the purpose of the contracting parties; if doubt still remains, we must construe the contract against the party who drafted it.").

Seller correctly argues that the district court erred in finding that Israelson drafted the Rosewood agreement. The pleadings and evidence at trial show that Johnson drafted the agreement and then the parties together revised it. But seller is incorrect in arguing that the rule of construing a contract against the drafter only applies when one party drafts the entire contract. *See Cherne Indus., Inc. v. Grounds & Assocs.,* 278 N.W.2d 81, 86, 89 (Minn.1979) (applying rule when construing a single paragraph in a standard noncompete agreement used by an employer for all of its employees and paragraph being construed had been drafted by the employee's attorney).

***6** Even if the district court erred in applying the rule of construing a contract provision against the drafter, the error is harmless because the district court also relied on the parties' conduct during performance of the Rosewood agreement and reached the same result it would have if it had not misapplied the rule of contract construction. Therefore, reversal is not required. *See* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored). "[W]here parties to a contract have given it a practical construction by their conduct, as by acts in performance thereof, such construction may be considered by the court in determining its meaning and in ascertaining the mutual intent of the parties...." *Cut Price Super Markets v. Kingpin Foods, Inc.,* 256 Minn. 339, 354, 98 N.W.2d 257, 268 (1959); *see also Investors Syndicate v. Baskerville Bros. Holding Co.,* 200 Minn. 461, 469, 274 N.W. 627, 631 (1937) ("The rule is that if the meaning of a contract is doubtful the practical construction which the parties placed upon it will be followed by the courts.").

The district court found: Although seller knew that improvements for Rosewood Village would not occur until 2003, it proceeded with performance of the agreement. Seller offered buyer about nine lots in 2002, with the balance to be delivered in 2003 upon completion of the development work. Seller did not object to buyer's marketing efforts. After requesting that the city remove interim completion dates in October 2002 that prevented buyer from receiving any lots in 2002, seller did not notify buyer that the Rosewood agreement was null and void.

Seller cites extensive evidence supporting its interpretation of the earnest-money clause. As addressed with respect to the Meadow Creek agreement, these factors were for the district court to consider in making the factual determination of the meaning of the Rosewood agreement.

III.

We review the district court's award of damages for an abuse of discretion. *VanLandschoot v. Walsh,* 660 N.W.2d 152, 156 (Minn.App.2003). One measure of damages for breach of contract is the amount that will place the plaintiff in the same situation as if the contract had been performed. *Logan v. Norwest Bank Minn., N.A.,* 603 N.W.2d 659, 663 (Minn.App.1999); *see also* 4 *Minnesota Practice,* CIVJIG 20.60 (1999) (stating that damages for breach of contract should put the non-breaching party in the same position the party would have been in had the contract not been breached).

> The general rule in Minnesota is that damages in the form of lost profits may be recovered where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness. This means that the nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. This rule does not call for absolute certainty. The controlling principle is that speculative, remote, or conjectural damages are not recoverable.

***7** *Cardinal Consulting Co. v. Circo Resorts, Inc.,* 297 N.W.2d 260, 266-67 (Minn.1980) (quotations omitted).

Seller relies on *Greer v. Kooiker,* 312 Minn. 499, 513, 253 N.W.2d 133, 142 (1977) to support the position that the difference between market value and purchase price is the only permissible measure of damages for the breach of a contract to convey land. But *Greer* did not involve land undergoing development, and seller's position is contrary to the rule stated in *Cardinal Consulting. Cf. Lassen v. First*

Bank Eden Prairie, 514 N.W.2d 831, 838 (Minn.App.1994) (stating that Minnesota follows rule of *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854), holding that damages recoverable in contract actions are those arising naturally from the breach or those which can reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of that breach), *review denied* (Minn. June 29, 1994); *Kerrey Constr. Co. v. Hunt,* 213 Neb. 776, 331 N.W.2d 519, 521-22 (Neb.1983) (applying *Hadley* rule to allow recovery of lost profits when resale of land has been established as being within parties' reasonable contemplation); *Republic Nat'l Life Ins. Co. v. Red Lion Homes, Inc.,* 704 F.2d 484, 488-89 (10th Cir.1983) (same); *Foster v. Bartolomeo,* 31 Mass.App.Ct. 592, 581 N.E.2d 1033, 1035 (Mass.App.Ct.1991) (affirming award of lost-profit damages to breach of contract to sell land).

Seller argues that the district court did not find that seller's breach of contract caused buyer damages. But the district court found: "Lost profits in this case are the natural and probable consequence of [seller's] breach of contract. The facts in this case support an inference of definite profits." The district court calculated buyer's lost profits by using the average price per home that buyer presold lot/house packages for in the Rosewood development ($175,220 for the detached townhomes and $232,055 for the single-family homes) multiplied by the total number of each lot type approved and sold in the Rosewood development (56 townhomes and 43 single-family homes), yielding a total sale price of $18,213,705. The district court used buyer's average profit margin over the last five years to calculate what buyer's profit margin would have been on the Rosewood development.

We conclude that the district court properly calculated buyer's lost-profits damages based on presale prices and buyer's average profit margin over the last five years. *See Leoni v. Bemis Co.,* 255 N.W.2d 824, 826-27 (Minn.1977) (affirming award of lost profits established, in part, by comparison between sales area affected by defendant's breach and unaffected areas); *Blaine Econ. Dev. Auth. v. Royal Elec. Co.,* 520 N.W.2d 473, 479 (Minn.App.1994) (affirming award of lost profits established by profit-margin testimony of project manager and competitor); *Spinett, Inc. v. Peoples Natural Gas Co.,* 385 N.W.2d 834, 839 (Minn.App.1986) (explaining that proof of profit loss may include a company's past performance and estimated future success); *see also Republic Nat'l Life,* 704 F.2d at 489-91 (affirming award of lost profits from construction and sale of homes as a result of breach of agreement to sell land on the basis of profit history and profit potential); *Tull v. Gundersons, Inc.,* 709 P.2d 940, 945 (Colo.1985) (stating that "the district court improperly excluded ... evidence of [a builder's] past profit experience on other projects and on the Ptarmigan project itself").

***8** Buyer argues that seller waived the affirmative defense of failure to mitigate damages by not pleading it. But if evidence relating to an unpleaded affirmative defense is introduced without objection, the defense is deemed as properly litigated. *Loppe v. Steiner,* 699 N.W.2d 342, 348 (Minn.App.2005).

Seller argues that buyer could have mitigated damages by obtaining replacement land or exercising the right of first refusal. There is no evidence that replacement land was available. Seller cites no authority supporting the position that to mitigate damages, a nonbreaching party is required to perform according to a contractual provision that only came into play because of the other party's breach.

Buyer argues that the district court erred in not awarding it lost-benefit-of-the-bargain damages in addition to lost-profits damages. Buyer bases its claim for lost-benefit-of-the-bargain damages on the incremental market-value increase between 2001 and 2003. But the district court found: "The average profit margin ... accounts for any lost damages [buyer] may have suffered. Profit takes into account all costs, including the price of lots, building materials and labor." Based on the evidence presented at trial, this finding was not clearly erroneous. Therefore, the district court's overall damage determination was not an abuse of discretion.

IV.

"Specific performance is an equitable remedy addressed to the sound discretion of the [district] court." *Flynn v. Sawyer,* 272 N.W.2d 904, 910 (Minn.1978). "Courts have broad discretion in fashioning remedies." *Wenzel v. Mathies,* 542 N.W.2d 634, 643 (Minn.App.1996), *review denied* (Minn. Mar. 28, 1996); *see Pooley v. Mankato Iron & Metal, Inc.,* 513 N.W.2d 834, 837-38 (Minn.App.1994) (holding courts may fashion equitable remedies to accomplish justice on facts of each case), *review denied* (Minn. May 17, 1994).

Buyer argues that the district court's order requiring it to pay an additional $13,635.74 for each of the 24 Meadow Creek lots was based on unreliable, speculative evidence. Buyer also objects to the district court considering the evidence without affording buyer the opportunity of a hearing to challenge the

evidence. Buyer was afforded the opportunity to submit its objections in writing, and the authority cited by buyer does not show that this was inadequate under Minnesota law.

Buyer objects to the third-party trucking invoices as inadmissible hearsay. The invoices were submitted to show costs incurred by seller and their authenticity was verified by Israelson's affidavit. The district court did not abuse its discretion in considering them. *See Theissen-Nonnemacher, Inc. v. Dutt,* 393 N.W.2d 397, 400 (Minn.App.1986) ("Bills and summary listings may be acceptable evidence even without the inclusion of underlying support.").

Buyer's remaining objections go to the weight and credibility of the evidence, which are issues for the district court to determine. *Fraser v. Fraser,* 702 N.W.2d 283, 287 (Minn.App.2005) (stating that appellate court defers to district court's determination of witness credibility and weight to be given testimony), *review denied* (Minn. Oct. 18, 2005).

***9 Affirmed.**

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