

Catherine J. Creswell, Appellant,
v.
Estate of Shari Howe, a/k/a Shari L. Howe, et al., Respondents,
Holland Neighborhood Town Home Association, Inc., et al., Respondents,
Rock Solid Realty Minnesota, LLC, Respondent,
ZipRealty, Inc., et al., Respondents,
Kurt Nowacki, Respondent.
A10-2170
STATE OF MINNESOTA IN COURT OF APPEALS
Filed September 19, 2011

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).

Affirmed; motions to dismiss granted; motion to supplement record denied Halbrooks, Judge
Hennepin County District Court File No. 27-CV-09-28804

John R. Dorgan, Minneapolis, Minnesota (for appellant)

Daniel A. Beckman, Lynn Schmidt Walters, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondents Estate of Shari Howe a/k/a Shari L. Howe and Robert L. Howe)

Robert T. Stich, Louise A. Behrendt, Stacey L. Sever, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for respondents Holland Neighborhood Town

Home Association, Inc., Diane Knust, Jeanne M. Gluesing, Jill Landers, and Byron Bennett)

Ryan P. Myers, Plymouth, Minnesota (for respondents Rock Solid Realty Minnesota, LLC, and Kurt Nowacki)

Timothy M. Kelley, Aleava Rael Sayre, Leonard, Street and Deinard P.A., Minneapolis, Minnesota (for respondents ZipRealty, Inc. and Debra Cooper)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Chief Judge; and Minge, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's decisions to (1) grant summary judgment to respondents; (2) reject her proffered evidence; and (3) grant respondents' motions for taxation of costs. Three respondents move this court to dismiss portions of appellant's appeal and appellant moves to supplement the record. We conclude that the district

court properly granted summary judgment to respondents and acted within its discretion in rejecting appellant's proffered evidence and by awarding costs. We therefore affirm the district court's order and deny appellant's motion to supplement the record on appeal. We grant respondents' motions to dismiss portions of appellant's appeal.

FACTS

On February 3, 2008, appellant Catherine J. Creswell entered into a purchase agreement to buy a townhome from respondent estate of Shari Howe. Appellant agreed to pay \$206,500 for the townhome and agreed to purchase it "as is." Respondent Robert Howe, the personal representative for the estate and Shari Howe's son, negotiated on behalf of the estate. On February 8, 2008, appellant received a resale disclosure certificate completed by respondent Holland Neighborhood Town Home Association indicating that there were no assessments and that the only fact deemed material to the sale was that the association did not have a separate outdoor faucet. After receiving the association's financial information, appellant inquired if there were any anticipated repairs. Respondent Kurt Nowacki (the seller's real-estate agent who worked for respondent Rock Solid Realty, LLC) forwarded the association's response to appellant. The response indicated that a fence next to the driveway had been the most recent improvement.

Appellant closed on her unit on February 28, 2008. As she walked out of the closing, appellant claims that she "began a sentence [to respondent Debra Cooper] about how she 'thought the Association was . . .' when Cooper interjected, '. . . trying to hide something.'" Cooper was appellant's real-estate agent and worked for respondent ZipRealty, Inc. Sometime in March 2008, appellant received the minutes from the association's February 25, 2008 board meeting. The minutes indicated that the board had addressed problems and issues related to the roofs, siding and soundproofing of the townhomes and that the board had discussed hiring an attorney to pursue its claims related to those issues. In August 2008, appellant asked for and received background information from the association about the alleged construction defects. It was clear from the documents that appellant received that the association had known about various construction defects for many years, some of which potentially affected appellant's unit.

In November 2009, appellant sued the estate, Howe, the association, Rock Solid, ZipRealty, Nowacki, Cooper, and four individual association board members. Appellant asserted rescission of contract against the Howe respondents; breach of contract against all respondents except Nowacki and Rock Solid; interference with contractual relations against all respondents except the estate; and breach of duty, fraud, unjust enrichment, and violation of consumer-protection statutes against all respondents.

In June 2010, Cooper, ZipRealty, and the Howe respondents brought separate motions for summary judgment. On July 1, 2010, the association and individual board members also moved for summary judgment. Appellant subsequently moved to amend her complaint to add a claim for punitive damages, eliminate her claim of interference with contractual relations, and dismiss her claims against the individual board members.

The district court granted appellant's motions to eliminate her interference-with-contractual-relations claim and to dismiss her claims against individual board members but denied her motion to amend the complaint to add a claim for punitive damages. The district court granted summary judgment to Cooper, ZipRealty, the Howe respondents, and the association and dismissed the claims against Nowacki and Rock Solid with prejudice.

Nowacki and Rock Solid were the first respondents to file a notice of taxation of costs. The other respondents subsequently filed separate notices for taxation of costs. Appellant objected to the taxation of costs of all respondents except Nowacki and Rock Solid on the ground that the notices were untimely. The district court awarded costs to each respondent. This appeal follows.

DECISION

I.

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). These questions are reviewed de novo. STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W. 2d 72, 77 (Minn. 2002). A party opposing a motion for summary judgment must do more than present evidence "which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). "A material fact is one which will affect the result or the outcome of the case depending on its resolution." Musicland Grp., Inc. v. Ceridian Corp., 508 N.W.2d 524, 531 (Minn. App. 1993), review denied (Minn. Jan. 27, 1994). In determining whether the district court properly granted the respondents' summary-judgment motions, we 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).

As an initial matter, appellant argues that the district court erroneously decided questions of fact in favor of respondents. Appellant seems to argue that, on a motion for summary judgment, the district court must take all of the allegations in the complaint as true and that it is the moving party's burden to provide sufficient evidence to refute the allegations in the complaint. But that is not the summary-judgment standard. It is true that if evidence in the record allows for more than one inference, that inference must be resolved in favor of the non-moving party. *Id.* But the non-moving party cannot rest on averments and allegations in the complaint. DLH, Inc., 566 N.W.2d at 71. Aside from appellant's assertions, our review of the record reveals no genuine issue of material fact in this case that would preclude judgment as a matter of law. We therefore turn to whether the district court erred in its application of the law.

Appellant did not provide us with any argument as to why the district court erred in dismissing her unjust-enrichment, breach-of-contract, or rescission claims against the various respondents. "It is well-established that failure to address an issue in brief

constitutes waiver of that issue." Peterson v. BASF Corp., 711 N.W.2d 470, 482 (Minn. 2006). "And issues not raised or argued in appellant's brief cannot be raised in a reply brief." Fontaine v. Steen, 759 N.W.2d 672, 676 (Minn. App. 2009). We therefore consider these issues waived, and we do not address them. As a result, we grant respondents' motions to dismiss these aspects of the appeal.

Appellant's remaining claims assert breach of duty, fraud, and violation of consumer-protection statutes. Other than mere assertions, appellant failed to present evidence that any respondent, other than the association, knew or should have known of the alleged construction defects prior to the sale of the townhome. We agree with the district court that Cooper's alleged statement that the association was "hiding something" is insufficient to create a genuine issue of material fact as to whether Cooper knew about any of the alleged construction defects. Without knowledge on the part of respondents, these claims cannot withstand summary judgment. We therefore affirm the district court's grant of summary judgment to the estate, Howe, Cooper, and ZipRealty on this basis.

The district court concluded that the evidence was sufficient to support claims against the association for failing to disclose the construction defects to appellant. The district court nevertheless granted the association's motion for summary judgment because appellant failed to prove that she was damaged by the association's nondisclosure. Appellant argues that she is not required to prove damages because damages should be presumed, given that she purchased her townhome without knowledge of the alleged construction defects.

In support of her argument, appellant relies on Arden Hills N. Homes Ass'n v. Pentom, Inc., wherein this court stated that "[i]n the absence of evidence to the contrary, the price the subsequent purchasers paid presumably reflected the existence of the patent defect." 475 N.W.2d 495, 501 (Minn. App. 1991), aff'd as modified, 505 N.W.2d 50 (Minn. 1993). Arden Hills involved purchasers of real property who were attempting to recover damages from a developer. *Id.* at 496. The property owners had suffered actual damages because they had to pay to have the construction defects remedied. *Id.* at 497. The question presented was whether subsequent purchasers of the homes were entitled to recovery. *Id.* at 500-01. This court held that only those property owners who purchased without knowledge of the defects were entitled to recover damages. *Id.* at 501.

Based on this reasoning, if appellant could prove some measure of damages due to the alleged construction defects, she, as a purchaser without knowledge of the defects, would be entitled to damages. But there are no damages in this case. Appellant was never assessed for any repairs, she has not paid anything out-of-pocket for repairs, and she has presented no evidence that the value of her individual unit has declined because of the alleged undisclosed construction defects. In addition, the record contains evidence that the association settled with the developer of the townhomes prior to the district court's summary-judgment order, and the settlement agreement allegedly requires the developer to remedy the defects. Appellant's claim against the association

—without any evidence of damages—cannot prevail. See *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. App. 2009).

Appellant asserts that her case cannot be resolved on summary judgment because there is a "rebuttable presumption" with respect to the issue of damages. It is true that if a non-moving party (i.e. appellant) "puts forth undisputed evidence that conclusively establishes a rebuttable presumption in its favor, the moving party is precluded from obtaining summary judgment." *Southcross Commerce Ctr., LLP v. Tupy Props., LLC*, 766 N.W.2d 704, 709 (Minn. App. 2009). But appellant did not provide any evidence of damages. There is nothing for the moving parties to rebut in this case. Because evidence of damages is an essential element of all of appellant's claims against the association, we affirm the district court's decision to grant the association's motion for summary judgment.

Finally, appellant argues that the district court erred by sua sponte granting summary judgment to respondents Nowacki and Rock Solid. District courts have the inherent power to grant summary judgment if the party is entitled to summary judgment and "the absence of a formal motion creates no prejudice to the party against whom summary judgment is entered." *Kellar v. VonHoltum*, 568 N.W.2d 186, 191 (Minn. App. 1997) (quotation omitted), review denied (Minn. Oct. 31, 1997); see also *Fed. Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251, 255 (Minn. App. 1988) (stating that a district court's use of its inherent authority to grant summary judgment should not be disturbed unless the objecting party can show prejudice), review denied (Minn. Oct. 26, 1988). Because the district court dismissed appellant's claims against Nowacki and Rock Solid on the same basis that it awarded summary judgment to the other respondents, appellant cannot show that she was prejudiced by their dismissal. Appellant had notice of these arguments and a meaningful opportunity to oppose summary judgment. Appellant was unable to overcome summary judgment, in part, because she failed to demonstrate any evidence of damages. There is nothing to suggest that appellant would have made different arguments regarding damages and that these arguments would have been successful if Nowacki and Rock Solid had formally moved for summary judgment. We therefore affirm the district court's dismissal of appellant's claims against Nowacki and Rock Solid.

II.

Appellant argues that the district court abused its discretion by refusing to admit into evidence a compact disc attached to an affidavit submitted in opposition to the summary-judgment motions. Absent an erroneous interpretation of the law, the question of whether to admit evidence is within the district court's broad discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). According to the parties, the disc contained appellant's discovery responses to all of the respondents, which amounted to more than 800 pages of documents. The district court noted that the "affidavit . . . failed to identify these documents, much less point out the relevance of each." The district court gave appellant the opportunity to resubmit the affidavit with the attached documents identified, but she did not do so.

The district court acted well within its discretion by rejecting the disc. Appellant claims that the documents "had been properly and timely filed . . . pursuant to Minn. R. Civ. P. 5.04." But this rule (stating that all papers required to be served upon a party shall also be filed with the district court) contains an exception for discovery responses — which appellant admits was the contents of the disc. The advisory-committee note to the rule states that "[f]iling of depositions, interrogatories, requests for admissions, and requests for production of documents, and any answers or responses to those requests, is not required and is specifically proscribed unless ordered by the Court." Minn. R. Civ. P. 5.04 1985 advisory comm. note. Because the district court did not order appellant to file her responses to respondents' discovery requests, it did not abuse its discretion by rejecting her unilateral attempt to do so. Accordingly, we deny appellant's motion to supplement the record on appeal with the disc.

III.

Each of the respondents requested and received costs in separate applications. Minn. R. Civ. P. 54.04 sets out the procedure for recovering costs. Subpart (b) states that "[a] party seeking to recover costs and disbursements must serve and file a detailed sworn application for taxation of costs and disbursements with the court administrator . . . not later than 45 days after entry of a final judgment as to the party seeking costs and disbursements." Minn. R. Civ. P. 54.04(b). Appellant does not contend that the respondents failed to submit their applications within this 45-day time period. Her argument is based on subpart (c). Rule 54.04(c) states that "[n]ot later than 7 days after service of the application by any party, any other party may file a separate sworn application as in section (b), above, or may file written objections to the award of any costs or disbursements sought by any other party." Nowacki and Rock Solid were the first to file their applications, and none of the other respondents filed their applications within seven days of Nowacki and Rock Solid's application. Appellant claims that these later applications are therefore time-barred.

Interpretation and application of procedural rules are legal issues that are reviewed de novo. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 153 (Minn. 2001). The district court held that

[r]ule 54.04(b) simply provides that a person seeking costs must serve and file an application within 45 days of the date of the judgment. . . . The seven day requirement is found in a subdivision entitled "objections." None of the [respondents] objected to, or had an application regarding, the costs being requested by Nowacki and Rock Solid. Each of the [respondents] had separate claims for costs that were not dependent on the request made by the other parties. Therefore, the seven day requirement for objections does not apply to the [respondents] in this matter.

The district court's interpretation follows the plain language of the rule.

Minn. R. Civ. P. 54.04(c) addresses the procedure to be followed when a party objects to another party's application for costs. Any party objecting to another party's application for costs must file a separate sworn application within seven days of the initial application. Minn. R. Civ. P. 54.04(c). If a party seeks to recover costs, it must file

its application within 45 days after entry of a final judgment "as to [that] party." Minn. R. Civ. P. 54.04(b). Because respondents who later sought their own costs were not objecting to Nowacki and Rock Solid's application, they were subject only to the 45-day time frame in subpart (b) and not to the seven-day time frame in subpart (c). We affirm the district court's awards of costs to respondents.

Affirmed; motions to dismiss granted; motion to supplement record denied.