

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1695**

City Center Commons, LLC,
Appellant,

vs.

DeSoto Associates, LLC,
Respondent.

**Filed April 24, 2017
Affirmed
Smith, Tracy M., Judge**

Washington County District Court
File No. 82-CV-16-3108

Bryan A. Welp, David K. Snyder, Johnson / Turner Legal, Forest Lake, Minnesota (for appellant)

Daniel M. Duffek, Warren E. Peterson, PFB Law, P.A., St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant City Center Commons LLC (City Center) challenges the summary-judgment dismissal of its action against respondent DeSoto Associates LLC (DeSoto). City Center argues that the district court erred in granting summary judgment for DeSoto

because DeSoto does not have a right of first refusal to purchase a piece of real property, the contractual language establishing DeSoto's right of first refusal is ambiguous, and there are genuine issues of material fact. City Center further challenges the district court's denial of its request to continue DeSoto's summary-judgment motion to allow time for discovery. We affirm.

FACTS

This action involves a shopping center that is comprised of three separately owned tracts of land. City Center and DeSoto are both commercial real-estate entities, and each owns one tract within the shopping center. The City of Forest Lake Economic Development Authority (the EDA) owns the third tract, which it previously purchased from Pace Development Inc. (Pace). The EDA's tract includes Lot 5, which is the piece of real property at issue in this action.

On December 20, 2012, DeSoto, the EDA, and Pace executed a document titled "amended and restated operation and easement agreement" (the OEA). Article VIII of the OEA establishes rights and obligations with regard to Lot 5:

ARTICLE VIII LOT 5 USAGE

The development and utilization of Lot 5 of the EDA tract, whether by [the] EDA or any assignee or successor in interest thereof, shall be subject to the prior written approval of DeSoto, which approval will not be unreasonably withheld, delayed or conditioned. Notwithstanding the foregoing, [the] EDA acknowledges DeSoto's concern that any building or other development upon and within said Lot 5 should not impede visibility and accessibility of and to buildings or development of DeSoto Tract. Any building to be located on said Lot 5 must be located in the west one-half (1/2) of the north one-half (1/2) of Lot 5 and the building shall not exceed

3,000 square feet. [The] EDA hereby grants DeSoto a ninety (90) day right of first refusal to participate with [the] EDA (on an equal basis) in any development of such Lot 5 (although DeSoto acknowledges that [the] EDA is allocated all fair market value with respect to Lot 5 in its undeveloped state in all events).

Several years later, on February 24, 2016, the EDA and City Center executed a purchase agreement for the sale of Lot 5 by the EDA to City Center (the Purchase Agreement). City Center maintains that it intended to construct a building on Lot 5, which it then planned to lease to Anoka Hennepin Credit Union (the Credit Union).

Paragraph 25 of the Purchase Agreement provides:

Right of First Refusal. Notwithstanding any contrary provision contained in this Agreement, [the EDA's] obligations under this Agreement are conditioned and contingent upon waiver of the right of first refusal of DeSoto contained in Article VIII of the OEA (the "Right of First Refusal"). As soon as possible after the Agreement Date, [the EDA] shall send written notice to DeSoto advising DeSoto of DeSoto's rights under the Right of First Refusal with respect to this Agreement as well as requesting DeSoto's waiver of the Right of First Refusal with respect to this Agreement (collectively, the "Right of First Refusal Notice"). The date of the earlier of (a) ninety (90) days after the date of the Right of First Refusal Notice and (b) DeSoto's written waiver of the Right of First Refusal with respect to this Agreement (and [the EDA's] written notice to [City Center] of such waiver) shall be deemed the "Commencement of Contingency Period Date." Notwithstanding any contrary provision contained in this Agreement, in the event that DeSoto exercises the Right of First Refusal with respect to this Agreement, this Agreement shall be null and void as between [the EDA] and [City Center] and the Earnest Money shall be refunded to [City Center].

Pursuant to its obligations under Paragraph 25 of the Purchase Agreement, the EDA sent DeSoto a letter on February 25, informing DeSoto of the Purchase Agreement,

reiterating DeSoto's right of first refusal under the OEA, and providing necessary steps for DeSoto to "exercise" its right under the OEA. DeSoto chose to exercise its right under the OEA and complied with the steps outlined in the EDA's letter, which involved providing notice to the EDA and depositing \$5,000 as earnest money with a third party. Around this same time, DeSoto also entered into a purchase agreement with the Credit Union, which provided that DeSoto would purchase Lot 5 from the EDA and then sell the property to the Credit Union.

After receiving notice of DeSoto's decision not to waive its right under the OEA and its compliance with the EDA's conditions, the EDA informed City Center that the Purchase Agreement was null and void under its own terms. In response, City Center brought suit against DeSoto on July 1, alleging claims of tortious interference with contract and tortious interference with prospective economic advantage and seeking injunctive relief. On September 9, DeSoto filed a motion for summary judgment. On September 23, City Center filed a motion for leave to amend its complaint to add the EDA as a defendant. In addition to opposing DeSoto's summary-judgment motion on the merits, City Center also requested that the district court continue the motion because the parties had not begun discovery. The district court granted summary judgment for DeSoto, dismissed City Center's complaint in its entirety, and denied City Center's motion for leave to amend as moot.

City Center appeals.

DECISION

I. The district court did not err in granting summary judgment for DeSoto.

City Center argues that the district court erred in granting summary judgment for DeSoto because the OEA does not grant DeSoto a right of first refusal to purchase Lot 5. City Center further argues that the OEA's language creating DeSoto's right of first refusal is ambiguous and that genuine issues of material fact preclude summary judgment.

This court reviews the district court's legal conclusions on summary judgment de novo, viewing the evidence in the light most favorable to the party against whom summary judgment was granted. *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). A district court must grant summary judgment where "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. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 564 (Minn. 2008). "The party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). "To survive summary judgment, a party must make a showing sufficient to establish the existence of all elements essential to that party's case." *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 870 (Minn. App. 1995), review denied (Minn. June 29, 1995).

A. Tortious interference with a contractual relationship

We first address the district court’s grant of summary judgment for DeSoto on City Center’s claim of tortious interference with a contractual relationship. “A cause of action for tortious interference with a contractual relationship requires five elements: (1) the existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages.” *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998) (quotation omitted). To determine whether City Center made a showing sufficient to establish the existence of its claim, we need only consider the third essential element: whether DeSoto intentionally procured a breach of the Purchase Agreement between the EDA and City Center.

“Absent ambiguity, the interpretation of a contract is a question of law” and is reviewed de novo. *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). “A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation.” *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (quotation omitted). “If a contract is unambiguous, the contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.” *Id.* at 346-47 (quotation omitted).

The parties do not dispute that Article VIII of the OEA “grants DeSoto a ninety (90) day right of first refusal to participate with [the] EDA (on an equal basis) in any development of” Lot 5. It is further undisputed that the Purchase Agreement incorporates this language from the OEA and states that the EDA’s obligation to sell Lot 5 to City Center

is “conditioned and contingent upon waiver of the right of first refusal of DeSoto contained in Article VIII of the OEA.” It is also undisputed that the Purchase Agreement states what occurs if DeSoto does not waive its right: “Notwithstanding any contrary provision contained in this Agreement, in the event that DeSoto exercises the Right of First Refusal with respect to this Agreement, this Agreement shall be null and void as between [the EDA] and [City Center].” The Purchase Agreement is unambiguous: It makes sale of Lot 5 to City Center contingent upon DeSoto’s waiver of its right of first refusal under the OEA.

Contrary to City Center’s assertions, resolution of this case does not require us to determine the meaning of DeSoto’s right of first refusal under the OEA. Rather, the only necessary determination is whether there is any genuine dispute that the OEA grants DeSoto a right of first refusal or that DeSoto refused to waive that right. The undisputed facts establish that the OEA grants DeSoto a right of first refusal and that DeSoto did not waive it. The undisputed facts thus establish that the Purchase Agreement was not breached when the EDA did not sell Lot 5 to City Center. Without a breach of contract, City Center is unable to establish the third element of tortious interference with a contractual relationship. The district court thus did not err in granting summary judgment to DeSoto on this claim.

B. Tortious interference with prospective economic advantage

We next address the district court’s grant of summary judgment for DeSoto on City Center’s claim of tortious interference with prospective economic advantage. A cause of action for tortious interference with prospective economic advantage requires five elements:

- (1) The existence of a reasonable expectation of economic advantage;
- (2) Defendant's knowledge of that expectation of economic advantage;
- (3) That defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation;
- (4) That in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and
- (5) That plaintiff sustained damages.

Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc., 844 N.W.2d 210, 219 (Minn. 2014). Again, as was the case with City Center's tortious-interference-with-contract claim, our analysis need only consider this claim's third essential element.

City Center has failed to articulate how DeSoto's actions were independently tortious or in violation of a state or federal statute or regulation. Instead, as discussed above, the undisputed facts establish that DeSoto simply chose not to waive its right of first refusal under the OEA and complied with the EDA's instructions regarding the exercise of that right. Therefore, because City Center is unable to establish the third element of tortious interference with prospective economic advantage, the district court did not err in granting summary judgment on this claim.¹

¹ City Center also challenges the district court's conclusion that "DeSoto is protected by the special privilege for competitors." We may affirm a grant of summary judgment if it can be sustained on any grounds. *Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 163 (Minn. 2012). Because City Center is unable to establish essential elements of its tortious-interference claims, we need not decide the applicability of this privilege under the facts of this case.

II. The district court did not abuse its discretion in denying City Center's continuance request.

City Center argues that the district court abused its discretion in denying City Center's request to continue DeSoto's summary-judgment motion to allow time for discovery. This court reviews a district court's denial of a continuance for purposes of additional discovery under an abuse-of-discretion standard. *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010).

A defendant may move for summary judgment "at any time." Minn. R. Civ. P. 56.02. Under the Minnesota Rules of Civil Procedure, a party opposing a summary-judgment motion may request that the district court deny or continue the motion on the ground that the non-moving party needs additional time to conduct discovery. Minn. R. Civ. P. 56.06. When determining whether to grant a continuance to allow discovery prior to deciding a summary-judgment motion, "the [district] court considers first, whether the [party seeking a continuance] has been diligent in obtaining or seeking discovery and, second, whether [that same] party seeks further discovery with the good faith belief that material facts will be uncovered, or is merely engaging in a fishing expedition." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. App. 2006) (quotation omitted).

Here, the district court was able to reach its summary-judgment decision by relying on the plain meaning of the Purchase Agreement's unambiguous language and the undisputed facts regarding the Purchase Agreement, the OEA, and DeSoto's actions. City Center has failed to identify any facts that could have been discovered that would have affected the district court's decision or could have created a genuine dispute of material

fact precluding summary judgment. *See McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 477 (Minn. App. 1985) (stating summary-judgment grant before completion of discovery was not premature where additional discovery would have neither aided the district court in determining whether material fact issues existed nor changed the result of the summary-judgment motion), *review denied* (Minn. Dec. 30, 1985). Accordingly, City Center has not demonstrated that the district court abused its discretion in denying its request to continue DeSoto's summary judgment motion to allow time for discovery.

Affirmed.