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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0836**

Scott J. Zimmer, et al.,
Appellants,

vs.

Brett M. Larson, et al.,
Respondents.

**Filed January 2, 2018
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-16-1557

Paul A. Sortland, Sortland Law Office, PLLC, Minneapolis, Minnesota (for appellants)

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(for respondents)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, T.,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellants argue that the district court erred by granting summary judgment in favor of respondents and holding that appellants could not produce evidence to prove that but for respondents' alleged malpractice, appellants would have obtained a more favorable result in the underlying real estate transaction. We affirm.

FACTS

This case focuses on a right of first refusal in a parking lease. In 2006, Resource Inc. entered into a parking lease with Irwin Baker. Resource rented parking spaces behind and next to Baker's building in Minneapolis (the Property). The parking lease contained a right of first refusal in favor of Resource. Baker is the Landlord, Resource is the Tenant.

The provision reads:

Right of First Refusal. Landlord hereby agrees that during the term of this Lease, Landlord grants to Tenant a right of first refusal to purchase all o[r] part of the Property, subject to the following terms and conditions:

- a. Notice of Offer. If at any time Landlord desires to sell all or any part of the Property, and receives a bona fide offer which it is willing to accept from any person, firm or corporation, ready, willing and able to purchase any or all of the Property, then and in such case Landlord shall immediately give written notice thereof to Tenant including in said notice the name and address of the offeror, the price offered, and the terms and conditions of the offer. Said notice shall be accompanied by a copy of the offer or other evidence of the offer.
- b. Notice of Intent to Purchase. Tenant shall have twenty (20) business days after receipt of said notice to agree to purchase the Property covered by said offer at the price and according to the terms specified in said offer.
- c. Loss of Right to Purchase. If Tenant does not exercise said right to purchase by giving written notice thereof to Landlord within said period, Landlord may accept said offer and complete said sale to the offeror in accordance with said offer, after the expiration of said twenty (20) business day period, which sale shall be subject to the terms and conditions of this Lease.
- d. Revival of Right to Purchase. If the terms of said offer are changed, then the right of first refusal given hereby

to Tenant shall be revived and said offer shall again be submitted to Tenant for the period and in the manner herein stated.

The parking lease continued until either party terminated it “by providing the other party with ninety (90) days prior written notice or earlier upon mutual agreement.”

At the time Baker entered into the parking lease, he owned AAA Labor, a day labor staffing agency he operated at the Property. In 2007, appellant SJZimmer Inc. purchased AAA Labor from Baker. SJZimmer is a Subchapter S corporation, and appellant Scott Zimmer is the sole shareholder. After the purchase, AAA Labor leased the Property from Baker.

In February 2012, Zimmer purchased a second property and informed Baker in an April 2012 letter that he did not intend to renew his lease for the Property, and that he would be moving AAA Labor to the new location at the end of the lease. Then in June, Baker contacted Zimmer and asked if he had any interest in purchasing the Property. On June 13, they met at a restaurant to discuss Zimmer purchasing the Property and “agreed on the terms” of the sale. The next day, Zimmer sent an email to Baker’s attorney which summarized the meeting and listed the agreed upon terms. The email read:

I met with [Baker] yesterday and discussed the sale of the AAA LABOR property to me. . . .

. . . .

My instructions to my attorneys and I also discussed this with [Baker] was to “draft the standard purchase agreement without any funny business in it”, I actually told them it could be boiler plate as [Baker] and I have agreed on the terms and no one is trying to cheat anyone here.

We agreed on the following terms.

Sale Price: \$350,000
Term: 10 Years
Interest: 4.5%
Payments to start Jan 1st, 2013
No penalty for early payoff

....
My only other concern that [Baker] was going to discuss with you is any parking lot easements/arrangements [Baker] may have with the adjoining property owners. [Baker] mentioned he was going to discuss this with you as well.

Later in the day on June 13, after having met with Baker, Zimmer contacted respondent Brett Larson, an attorney then with respondent Saliterman & Siefferman P.C., to draft a contract for deed to purchase the Property.¹

The parties dispute when attorney Larson became aware of the existence of the right of first refusal in the parking lease. However, it is undisputed that Zimmer did not consult Larson about purchasing the Property until after his June 13 meeting with Baker. And, Larson became aware of the right of first refusal by June 20 because Baker's attorney informed Larson in an email that day that the contract for deed needed to be made subject to the right of first refusal.

On July 3, Baker's attorney informed Resource of Zimmer's offer to purchase the Property. Resource timely notified Baker's attorney that it was exercising its right of first refusal to purchase the Property. In spite of receiving this notice, Baker proceeded with the sale to Zimmer, and on August 23, Zimmer and Baker executed a contract for deed for the Property. Baker had been experiencing some health issues, and on September 21 he

¹ While the email refers to a purchase agreement, the terms contemplate a contract for deed, which is what Zimmer's attorney drafted.

passed away. In March 2013, Resource commenced a civil action against Baker’s estate and Zimmer and ultimately obtained a ruling that it had a valid right of first refusal, which it timely exercised, and that Resource was entitled to sole possession and ownership of the Property. In February 2016, Zimmer filed this action against Larson and his former law firm. On April 12, 2017, the district court granted summary judgment in favor of Larson and Saliterman & Siefferman, after concluding that Zimmer could not prove that but for Larson’s alleged malpractice, he would have obtained a better result in the underlying transaction. This appeal followed.

DECISION

Our court reviews a district court’s summary judgment decision de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). 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,” viewing “the evidence in the light most favorable to the party against whom summary judgment was granted.” *Id.*; *STAR Ctrs, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). While we “must not weigh the evidence,” we are “not required to ignore [our] conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

To succeed on a claim for legal malpractice arising out of a transactional matter, a plaintiff must satisfy four elements: “(1) an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts proximately caused the

plaintiff's damages; and (4) that but for the defendant's conduct, the plaintiff would have obtained a more favorable result in the underlying transaction than the result obtained." *Schmitz v. Rinke, Noonan, Ltd.*, 783 N.W.2d 733, 738 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). If any of the four elements are not satisfied, the plaintiff's claim fails. *Id.* at 739.

In "applying the 'but for' test, we must envision what would have occurred but for the negligent conduct." *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 812 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). A plaintiff cannot merely speculate about many positive things that could have happened; rather, a plaintiff must introduce concrete evidence of what would have happened but for the defendant's negligence, "and what those actions would have reasonably produced." *Id.* at 813.

Larson was not involved in Zimmer's attempt to purchase the Property until after the June 13 meeting between Baker and Zimmer. If that meeting between Baker and Zimmer triggered Resource's right of first refusal, Zimmer cannot establish that but for Larson's conduct he "would have obtained a more favorable result in the underlying transaction." *Schmitz*, 783 N.W.2d at 738. There would have been nothing that Larson could have legally done that would have eliminated the right of first refusal without Resource choosing to waive its right—which it would not have done.²

² Because Resource exercised its right of first refusal, and went to court to enforce that right, any argument that Larson could have convinced Resource to waive its right of first refusal "is mere speculation" and is not sufficient to show but-for causation. *See Schmitz*, 783 N.W.2d at 747.

Resource's right of first refusal is contained in a parking lease contract between Baker and Resource. "Absent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). "Whether language in a contract is plain or ambiguous is a question of law that we review de novo." *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). "The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010).

The right of first refusal in the parking lease is triggered "at any time Landlord desires to sell all or any part of the Property, and *receives a bona fide offer which it is willing to accept.*" (Emphasis added.) After receiving such an offer, "Landlord shall immediately give written notice thereof to Tenant including in said notice the name and address of the offeror, the price offered, and the terms and conditions of the offer." This language created a right of first refusal in favor of Resource. *See Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409, 410 (Minn. 1984) (treating the following language as creating right of first refusal: "Lessor shall not sell either the leased premises or the said adjoining premises without first giving Tenant the privilege to purchase the same at the best bona fide offer by the lessor at any time during the period or extended period of this lease." (alteration omitted)). A right of first refusal is similar to an option contract with a condition precedent. *Id.* at 411. When the condition precedent is satisfied, the option

springs to life and gives the holder of the right the option to purchase whatever is subject to the right.³ *Id.* at 411–12.

Here, the condition precedent is Baker's receipt of a bona fide offer that he was willing to accept. Once Baker received a bona fide offer that he was willing to accept, Baker had the duty to notify Resource of the offer, allowing Resource to decide whether to exercise its option to purchase.

Zimmer argues that the terms of the right of first refusal in this parking lease and the law on rights of first refusal require (1) a bona fide offer, and (2) notice to the holder of the right before the right is triggered. His argument misinterprets the contract and misunderstands the law. First, the language in the contract creating the right of first refusal is explicit: once Baker has received a bona fide offer he is willing to accept, he has the contractual duty to notify Resource of the offer. Failure to notify Resource would breach the contract and give Resource the power to demand specific performance. *See Hempel v. Creek House Tr.*, 743 N.W.2d 305, 310 (Minn. App. 2007) (holding that when required

³ Zimmer argues that because the parking lease was terminable on a 90-day notice, Larson could have contacted Baker and persuaded Baker to terminate the lease, eliminating the right of first refusal. Larson counters that this argument is speculative and that, in any event, such action would have constituted a tortious interference with contract and would have subjected both his law firm and Zimmer to liability for damages resulting from such interference. If the right of first refusal was triggered before Larson got involved, terminating the parking lease would not have eliminated the right of first refusal because it already would have ripened into an option to purchase in favor of Resource. *See Park-Lake*, 352 N.W.2d at 410–11. Thus, regardless of whether Zimmer's recommended course of action would have constituted tortious interference, if the right had already ripened into an option to purchase, Zimmer's recommended course of action would not have eliminated Resource's right of first refusal or had the effect of obtaining a more favorable result in the transaction.

notice is not given right of first refusal is breached); *see also* 3 Eric Mills Holmes, *Corbin on Contracts* § 11.3, at 471–72 (rev. ed. 1996).

Second, Zimmer misinterprets the case he relies on for his argument. While *Dyrdal v. Golden Nuggets, Inc.*, states that “[o]nce the owner receives an acceptable offer and notifies the right-holder, the right of first refusal is triggered,” the issue in *Dyrdal* was whether the notice provided to the holder of the right was adequate. 672 N.W.2d 578, 584 (Minn. App. 2003), *aff’d*, 689 N.W.2d 779 (Minn. 2004). If the notice was adequate, it started the clock on the right-holder’s time to act on the option to purchase created by the right. *Id.* at 586. So, for purposes of when the clock on exercising the right begins to run, the right is not triggered until notice is provided to the holder. *Id.* at 584. But, if the question is whether the right is triggered, all that is required is receipt by the property owner of a bona fide offer he is willing to accept. *Park-Lake*, 352 N.W.2d at 411; *Hempel*, 743 N.W.2d at 310. Here, the explicit language in the parking lease only requires a bona fide offer Baker was willing to accept, and thus receipt of a bona fide offer Baker was willing to accept triggers Resource’s right of first refusal.

The June 13 meeting resulted in a bona fide offer that Baker was willing to accept, triggering the right of first refusal. Zimmer recognized this in an email the following day to Baker’s attorney, stating that he and Baker had “agreed on the terms” of the sale. The email also contained what those terms were: the price, the term of the contract, the interest rate, when payments would begin, and that there would be no early payoff penalty. While the subsequent contract for deed went through three drafts, there were no material changes to any of these key terms.

Zimmer's arguments to the contrary are unpersuasive. He argues that the right of first refusal was not triggered by the June 13 meeting because there was no binding decision made and the email was not a binding agreement. But whether there was a binding agreement is irrelevant. The right of first refusal in the parking lease is not triggered by an enforceable contract, but by Baker's receipt of a bona fide offer he was willing to accept.

In addition to the explicit language of the contract—which only requires a bona fide offer Baker was willing to accept—the revival provision in the right of first refusal confirms that a binding contract was not required. The provision reads: “If the terms of said offer are changed, then the right of first refusal given hereby to Tenant shall be revived and said offer shall again be submitted to Tenant for the period and in the manner herein stated.” Contracts generally cannot be unilaterally modified, *Camburn v. Hubbling*, 307 Minn. 168, 171, 238 N.W.2d 622, 624 (1976), and the ability to revive the right of first refusal when there is a modification only makes sense if the right is triggered by an offer, not by a binding contract. Moreover, the loss of the right to purchase provision only grants the Landlord the ability to accept the offer after expiration of the option period. If a binding contract was required to trigger the right of first refusal, there would be no need to authorize acceptance of the offer after expiration of the option to purchase because the Landlord would already have accepted the offer and formed a binding contract.

And, if rights of first refusal were only triggered by executing a binding contract, the very act of triggering the right would simultaneously breach the right because entering into a binding contract to sell the property fails to give the holder of the right the option to purchase the property. 3 Eric Mills Holmes, *Corbin on Contracts* § 11.3, at 479–80 (rev.

ed. 1996) (“When O receives an offer from C, O’s acceptance of that offer without first offering to B on the same terms is a breach for which B can recover damages”). Even Zimmer’s argument for how Larson should have proceeded to extinguish the offer admits that triggering the right of first refusal only required an offer Baker was willing to accept, not a binding contract. Zimmer argues that Larson

should have essentially told Baker the following: “My client is interested in making an offer for the Property. However, after reading the Parking Lease, he will not make an offer so long as the right of first refusal exists because if he does make such offer and it is one Baker wants to accept, the offer will trigger the right of first refusal. So, please do what is necessary to get rid of the right of first refusal and then we will make an offer.”

Zimmer also argues that the June 13 meeting only resulted in a term sheet which Zimmer proposed to Baker, and it was not an offer that Baker was willing to accept. But, the June 14 email from Zimmer to Baker’s attorney explicitly states that “[Baker] and I have agreed on the terms,” and then lists those terms. Zimmer does not point to any evidence that casts doubt on his own statement of Baker’s willingness to accept a deal on the terms listed in the email.

Instead, Zimmer claims the terms were conditional because the email references a concern about a “parking lot easement/arrangements [Baker] may have with the adjoining property owners.” This argument is another way of saying that the June 13 meeting did not create a binding contract, and therefore it did not trigger the right of first refusal. To avoid breaching the right of first refusal, Baker needed to make any acceptance of Zimmer’s offer conditional on Resource’s right of first refusal. This is not evidence that Baker was unwilling to accept the terms Zimmer offered.

Finally, Zimmer's reliance on a supreme court case for the proposition that but-for causation is a fact issue for the jury is misplaced. See *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811 (Minn. 2006). In that case there was testimony which, if believed, showed that the attorney could have obtained a more favorable result for the client, creating a material dispute of fact for the jury. *Id.* at 819–20. But here, because the right of first refusal was triggered before Larson became involved in the transaction, any dispute of fact is not material because there was nothing Larson could have done to obtain a more favorable result for Zimmer, and as a matter of law Zimmer cannot establish but-for causation.

Because the right of first refusal was already triggered by the time Zimmer involved Larson in the transaction, there was nothing that Larson could have done that would have prevented Resource from exercising its option to purchase. Thus, Larson could not have obtained a more favorable result for Zimmer in the transaction.⁴

Affirmed.

⁴ Because resolution of this issue resolves the dispute, we decline to address whether there was an attorney-client relationship between Larson and SJZimmer or any of the other arguments raised in respondents' brief.