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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0232**

Nancy S. Schneider, et al.,
Respondents,

vs.

Merrill G. Oestreich,
Appellant,
Linda Oestreich, intervenor,
Appellant.

**Filed September 10, 2018
Affirmed
Florey, Judge**

Washington County District Court
File No. 82-CV-16-3220

David S. Kendall, Campbell Knutson, P.A., Eagan, Minnesota; and

Mark J. Vierling, Eckberg & Lammers, P.C., Stillwater, Minnesota (for respondents)

Joel M. Anderson, White Bear Lake, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

After a series of nonpayments under the terms of a contract for deed, respondents served appellants with a notice of cancellation of the contract for deed. Appellants filed a motion to enjoin that notice, which the district court denied. Appellants appealed, arguing

respondents' cancellation notice failed to comply with statutory requirements and that the district court abused its discretion by denying their motion for injunctive relief. We affirm.

FACTS

The parents of appellant Merrill G. Oestreich (Merrill G.) and respondents, Craig R. Oestreich and Nancy Schneider (respondents), executed a trust in December 2005. The trust designated the parents as the first trustees and initial beneficiaries, and the parents transferred their interest in their homestead property (the property) to the trust.

The siblings' father died in December 2008, and their mother became the sole trustee and beneficiary. In January 2010, the siblings' mother executed a codicil to her will in which she referenced a contract for deed that allegedly transferred the trust property to appellants Merrill G. and his wife, Linda Oestreich. The codicil also contained a provision stating that any "outstanding balance of any unpaid financial obligations of Merrill G." owed to the mother at her death were "hereby devised, forgiven and bequeathed solely to Merrill G." by operation of the trust and the contract for deed. The referenced contract for deed was never recorded.

Sometime in August or September 2011, the siblings' mother executed a second contract for deed that transferred the property to appellants under the following terms: (1) appellants were to pay the trust the purchase price of \$345,000 with \$17,200 prepaid; (2) the remaining balance was to be paid in monthly installments of \$800; and (3) the outstanding principal would accrue interest at 3.25% annual percentage rate (APR).

The trust would convey marketable title to the property to appellants once these terms were satisfied. This second contract for deed was recorded. The mother died in May 2016 and Merrill G. became the successor trustee. Each of the siblings then had a one-third beneficiary interest in the trust.

Just before Merrill G. became trustee, he told respondents that he was not making the monthly \$800 payments to the trust. Respondents filed suit against appellants in July 2016. The lawsuit intended to clarify multiple issues with the trust, including, what effect their mother's codicil had on the trust, the current ownership of the property, an accounting of the trust, and removal of Merrill G. as the successor trustee. Appellants countersued and argued that various services and work on the property—both before and after the mother's death—should apply as an in-kind credit to offset the financial obligations under the contract for deed. While litigation was underway, Merrill G. recorded a trustee's deed conveying the property to himself and his wife pursuant to the second contract for deed.

Respondents filed a motion for summary judgment which the district court granted. The district court found that the express terms of the second contract for deed required cash payments and the trust's bank records showed that neither the \$17,200 prepayment nor any of the monthly \$800 installments were received. The district court determined that the mother's codicil did not modify the trust and that title to the property remained within the trust subject to the terms of the second contract for deed. The district court rescinded Merrill G.'s trustee's deed conveying the property to himself and his wife and then removed Merrill G. as trustee. The district court dismissed with prejudice all of appellants'

counterclaims on the merits. Judgement was entered on January 4, 2017. Appellants did not appeal.

On September 26, 2017, the trust served appellants with a notice of cancellation of the second contract for deed based on appellants' failure to pay any amount due under the contract. The notice of cancellation described the default as follows:

Failure to pay the prepayment due and payable on or before September 30, 2011, namely, a prepayment in the amount of \$17,200; and

[f]ailure to pay any of the \$800 per month payments due the first day of each month after September 30, 2011 currently at \$57,600; and

[f]ailure to pay any contractual interest on all unpaid balances, with the full outstanding principal amount of \$345,000 accruing interest at 3.25% APR since September 30, 2011.

The notice informed appellants that the contract for deed would be cancelled within 60 days unless the breach was cured.

Appellants filed a motion for a temporary injunction to stay the cancellation on November 2, 2017. Appellants again argued that they performed various services on the property that should be applied as an in-kind credit towards the payment obligations under the contract. The district court denied the motion since the express terms of the contract required cash payments—not services for cash and because appellants were unlikely to succeed on the merits of their claim. Appellants appealed.

DECISION

I. Appellants' case is not barred under the rules of appellate procedure.

As a preliminary matter, respondents argue that appellants did not comply with Minn. R. Civ. App. P. 108.02, which bars their appeal. Rule 108.02, subdivision 1, requires a party seeking an order granting an injunction while an appeal is pending pursuant to Minn. R. Civ. P. 62.02 to first move for the injunction at the district court. Rule 108.02 further provides:

[A] trial court may grant the relief described in subdivision 1 of this rule if the appellant provides security in a form and amount that the trial court approves. The security provided for in this rule may be in one instrument or several. The appellant must serve proof of the security in accordance with Rule 125.02.

Minn. R. Civ. App. P. 108.02, subd. 2. The essence of respondents' argument is that appellants did not provide the security and required proof under subdivision 2.

Respondents previously raised this issue to this court, and we rejected this argument because the "appellate rules explain how to seek a stay pending appeal, but do not require an appellant to seek such relief." Respondents' confusion appears to stem from their belief that the district court's denial of appellants' motion for temporary injunction triggers appellate rule 108.02. It does not. It is the injunction pending appeal under Minn. R. Civ. P. 62.02 resulting from the denial of a temporary injunction that implicates appellate rule 108.02. Because there was no request for an injunction pending appeal in this case, Minn. R. Civ. App. P. 108.02 is inapplicable.

II. Appellants forfeited their claim regarding compliance with statutory notice requirements.

Appellants argue that respondents' notice of cancellation of the contract for deed failed to comply with statutory notice requirements. However, appellants did not raise this issue in the district court when arguing for the temporary injunction. Parties on appeal are bound by the theories actually tried in the district court, no matter how erroneous or careless those theories were. *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957). Appellate courts generally do not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In their motion for a temporary injunction, the document that led to this appeal, appellants did not complain about the adequacy of the cancellation notice. Instead, appellants appear to reargue the conclusions contained in the court's previously issued summary-judgment order. We are unable to find anything in the record indicating that appellants raised the issue in their motion for an injunction that concerned procedural defects in respondents' notice of cancellation. Further, counsel for appellants at oral argument was unable to direct this court to anywhere in the record where this issue was addressed in the district court. For this reason, we conclude the appellants are raising this issue for the first time on appeal, and we decline to address the merits of the issue.

III. The district court did not abuse its discretion by denying appellants' motion for a temporary injunction.

Appellants argue that the district court abused its discretion by denying their motion to enjoin respondents' notice of cancellation under Minn. Stat. § 559.211, subd. 1 (2016).¹ Temporary injunctive relief is available under section 559.211 subdivision 1, "subject to the requirements of rule 65 of the Rules of Civil Procedure for the District Courts."

Under rule 65, district courts have broad discretion to grant or deny a temporary injunction, and this court will reverse only for abuse of that discretion. *U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 434 (Minn. App. 2000), *review denied* (Minn. Oct. 25, 2000). In deciding whether to issue a temporary injunction, courts consider the following five factors: (1) the preexisting relationship between the parties; (2) the harm that would result if the injunction were denied or issued; (3) the public policy of granting or denying the injunction in light of the facts; (4) any administrative burdens in the judicial oversight and enforcement of the injunction; and (5) the likelihood that one party or the other will prevail on the merits. *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). A district court's factual findings in its consideration for an injunction will not be set aside unless they are clearly erroneous. *LaValle v. Kulkay*, 277 N.W.2d 400, 402 (Minn. 1979).

¹ Importantly, this appeal does not arise from the district court's order granting summary judgment to respondents. That judgment was entered on January 4, 2017, and became final 60 days later. See Minn. R. Civ. App. P. 104.01, subd. 1 (providing that "an appeal may be taken from a judgment within 60 days after its entry" unless a different time is specified by statute). Once the 60-day limit expires, the judgment becomes final—meaning that it is no longer appealable and the district court's jurisdiction to amend the judgment is terminated. *Mingen v. Mingen*, 679 N.W.2d 724, 727 (Minn. 2004).

A. Preexisting relationship

“A temporary injunction is an extraordinary equitable remedy, and its purpose is to preserve the status quo until adjudication of the case on the merits.” *Pac. Equip. & Irrigation., Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. App. 1994), *review denied* (Minn. Sept. 16, 1994). The district court found that the appellants’ arguments for the temporary injunction were identical to those giving rise to its previous summary-judgment order. Although it did not say the status quo would be preserved, the district court implied this result when it noted that appellants brought their injunction motion “weeks before the cancellation” of the contract for deed, and that the court did not see a need to issue an injunction “in order to give [appellants] the opportunity to have these claims addressed at this late juncture.” We agree with the district court that denying appellants’ motion did little to change the parties’ existing relationship at the time, and we conclude the district court’s findings were not clearly erroneous.

B. Potential harm

Standing alone, failing to show irreparable harm is generally enough to deny a temporary injunction. *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). And while appellants must show “irreparable harm to trigger an injunction,” respondents only need to show “substantial harm to bar it.” *Pac. Equip. & Irrigation., Inc.*, 519 N.W.2d at 915.

The district court relied on its previous summary-judgment finding that appellants failed to pay any amount toward the contract for deed. It found that in the absence of an injunction, respondents would have a right to regain possession of the property. “For each

month that the buyer has not made the required payment,” the district court wrote, “the seller suffers additional damages.” This harm would be compounded if an injunction were put in place because respondents could not attempt to mitigate their damages. The district court reasoned that there was “simply no reason to compound [respondents’] plight” by depriving them of “possession and control by issuing an injunction.” We agree. The contract for deed required appellants to make an initial payment and monthly payments, something that had not yet occurred at the time of the district court’s decision. Allowing appellants to continue nonpayment exacerbated the harm to respondents. We conclude the district court’s findings regarding potential harm were not clearly erroneous.

C. Public policy

The district court found that the claims in the injunction motion were already decided in the summary-judgment decision and appellants “have known since at least June, 2017, that the Trust intended to sell the Property.” The court concluded that finality of these claims and alleviating the administrative burdens involved in further judicial oversight weighed against issuing the injunction. Again, we agree. The district court settled these claims prior to appellants’ injunction motion and public policy cautioned against allowing the district court to referee the claims again; the district court did not clearly err in its findings.

D. Likelihood of success

The likelihood that one party will succeed on the merits is the most important factor in the *Dahlberg* analysis. *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660, 666 (Minn. App. 2009). The district court concluded appellants were unlikely to succeed on the merits

because the claims in their injunction motion were already heard on the merits, and decided against them with prejudice, in the court’s summary-judgment order.²

In their motion for a temporary injunction, appellants claimed that their “credits”—that is, services appellants made to the property in upkeep and more—likely totaled more than the purchase price of the contract for deed. Given this possibility, appellants argued that the notice of cancellation’s demand for the full amount of the contract was inequitable without completing an accounting of these “credits.” The district court rejected this argument because it is “the legal nature of a contract for deed that the buyer on a contract for deed is allowed to occupy the property and is required to keep it up.” The court went on to explain that buyers in a contract for deed run the risk that they could lose all contract payments and investments if the contract is cancelled. This is not inequitable, the court concluded, because any improvements made by a purchaser in a contract for deed “are made solely at their own risk, to which they benefit if they complete the transaction, and to which they lose if they do not.”

The district court also reiterated that the plain language of the contract for deed did not allow in-kind credits to substitute for payment. The district court found the contract language required “payment of cash” to the trust, and that it was “undisputed that [appellants] have made no cash payments” required under the contract for deed. We have

² As to the possibility that some of appellants’ arguments might involve new allegations, specifically, that certain services provided by appellants to Merrill G.’s mother and the property should offset the contract price, the district court concluded any such claims were improper because they “must be raised in a new lawsuit, properly served and filed pursuant to the Rules of Civil Procedure.”

said that a “clear and unambiguous contract is enforced in accordance with the plain language of the contract.” *Terminal Transp., Inc. v. Minn. Ins. Guar. Ass’n*, 862 N.W.2d 487, 489 (Minn. App. 2015), *review denied* (Minn. June 30, 2015). The district court concluded that based on the express language of the contract alone, appellants’ services could not be used as a credit to offset the contract price.

Based on our review of the record, we do not believe the district court clearly erred in these findings. Appellants’ injunction claims are similar, if not identical, to their summary-judgment claims, which were decided against them and became final before their injunction motion. And even if these claims were properly before the district court for the first time in the injunction motion, they would likely fail on the merits because the express contract language requires cash payments, and the very nature of a contract for deed assumes the risk that improvements to property could be lost in a cancellation. For all these reasons, we conclude the district court did not abuse its discretion by denying appellants’ motion for temporary injunction.

Affirmed.