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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1864**

Nicollet Plaza, LLC,
Appellant,

vs.

Chase Real Estate, Inc.,
Respondent,

City of Burnsville,
Respondent,

KSH Development, LLC,
Respondent.

**Filed July 29, 2019
Affirmed
Slieter, Judge**

Dakota County District Court
File No. 19HA-CV-17-1764

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Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Appellant Nicollet Plaza, LLC (NP) appeals from the district court's summary judgment order dismissing NP's action (1) seeking a declaration that it reasonably withheld approval of a development plan created by respondent Chase Real Estate, Inc. (Chase), (2) seeking a declaration that respondent City of Burnsville (Burnsville) exceeded its zoning authority by approving Chase's development plan, and (3) asserting a breach-of-contract claim. NP also challenges the district court's denial of its request for a permanent injunction. Because NP failed to show a genuine issue of material fact that the 2017 plan is not in substantial accordance with the 2004 plan and failed to show genuine issues of material fact or errors of law on its alternative claims, we affirm.

FACTS

This appeal involves a dispute over the development of lot 3 in the Nicollet Plaza development (Nicollet Plaza) in Burnsville. Nicollet Plaza consists of several retail and residential buildings; NP currently owns several lots in Nicollet Plaza, including a shopping center. NP purchased its lots from the original developer, Opus Northwest, LLC (Opus), in 2004. Respondent KSH Development, LLC (KSH) is the current owner of the undeveloped lot 3. Chase seeks to construct a mixed-use apartment complex on lot 3.

Development of Nicollet Plaza began in the early 2000s. In 2004, Opus purchased 35 lots in Burnsville that would ultimately become Nicollet Plaza. In October 2004,

Burnsville, Opus, and KSH entered into a development contract/planned-unit-development agreement (PUD agreement) regarding lot 3 and surrounding lots. Prior to the PUD agreement, the Nicollet Plaza lots were zoned under Burnsville's "Heart of the City-1" zoning designation. Pursuant to Burnsville's code, the PUD agreement was intended to give the parties flexibility in developing Nicollet Plaza by granting the project relief from the "strict application of required setbacks, yard areas, lot sizes . . . and other performance standards associated with traditional zoning[]"" Burnsville, Minn., City Code § 10-27-1 (2010).

The PUD agreement also set forth various plans for the development of Nicollet Plaza. On lot 3, the PUD agreement called for a four-story mixed-use building with retail and residential units on the main floor and residential units on the upper floors (2004 plan). The 2004 plan depicts 249 parking spaces and 192 bedrooms for a ratio of 1.2 parking spaces per bedroom.

The PUD agreement also included a provision relating to amendments:

The action or inaction of [Burnsville] shall not constitute a waiver or amendment to the provisions of this [c]ontract. To be binding, amendments or waivers shall be in writing, signed by the parties and approved by written resolution of the City Council. [Burnsville's] failure to promptly take legal action to enforce this Contract shall not be a waiver or release.

Over the years, the PUD agreement was amended seven times. No amendment was signed by all parties.

In October 2004, Opus also executed a declaration of reciprocal easements, covenants, conditions, and restrictions (declaration). In addition to providing parking

easements and other conditions, the declaration requires Opus to approve any improvements to lot 3:

No improvements shall be constructed, erected, expanded or altered on any of the Outparcels until the plans for the same [including site layout, signage, civil engineering drawings (including finished floor elevations), exterior appearance, parking and landscaping] have been approved by *Declarant*, *which approval shall not be unreasonably withheld so long as such plans shall be substantially in accordance* with Declarant's project development plans submitted to and approved by [Burnsville] as part of the planned development of the Shopping Center.

(Emphasis added and first alteration in original.) NP assumed Opus's rights under the declaration in December 2004.

Also in October 2004, Burnsville and KSH entered into a contract for private redevelopment (TIF agreement) that linked tax-increment-financing opportunities to lot 3 if certain "minimum improvements" were constructed on the lot. The TIF agreement defined "minimum improvements" as including "owner-occupied condominiums" but also provided that the TIF agreement could be amended by written agreement approved by Burnsville and KSH. The TIF Agreement was amended several times by KSH and Burnsville. In April 2017, it was amended to define "[m]inimum [i]mprovements" as "at least 150 rental housing units with at least 8,000 square feet of commercial space."

Lastly, also in 2004, Opus entered into a purchase agreement with KSH (Opus-KSH purchase agreement). The Opus-KSH purchase agreement requires KSH to construct improvements on lot 3 "in accordance" with the TIF agreement:

[KSH] shall design and construct the [i]mprovements in accordance with the approved [KSH] Plans. [KSH] shall

construct the Improvements in a good and workmanlike manner, in accordance with all applicable laws and regulations, including the TIF Agreement.

In April 2018, Opus assigned its rights under the Opus-KSH purchase agreement to NP.

Despite the 2004 plan, lot 3 remained undeveloped. In 2016, Chase sought to construct a mixed-use building on lot 3 with commercial retail on the main floor and luxury apartments above. To that end, KSH and Chase entered into a purchase agreement for lot 3. In 2017, after negotiating with Burnsville, Chase developed a plan for lot 3 (2017 plan) that called for 265 parking spaces and 213 bedrooms, at a ratio of 1.2 spaces per bedroom. The 2017 plan did not conform to Burnsville's zoning ordinance because of issues related to density, parking, building height, and setbacks. Burnsville responded to these issues by approving an amendment to the PUD agreement that allowed the 2017 plan to proceed; NP did not sign this amendment.

In April 2017, Chase sent its final plan for lot 3 to NP and requested NP's approval. NP refused to approve the 2017 plan and on May 12, 2017, sued Chase, KSH, and Burnsville, claiming breach of contract, promissory estoppel, and third-party beneficiary enforcement rights. NP also sought declaratory relief and a permanent injunction enjoining Chase from constructing apartments on lot 3.

In response, KSH filed a counterclaim seeking declaratory relief that NP unreasonably withheld approval of the 2017 plan and claiming tortious interference with the KSH-Chase purchase agreement. Respondents moved for summary judgment on all of NP's claims. The district court granted respondents' motions and dismissed NP's claims.

The parties then agreed to dismiss KSH's counterclaim. This appeal follows. NP does not challenge the dismissal of its promissory estoppel or third-party beneficiary claims.

D E C I S I O N

“A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “On appeal, we review a grant of summary judgment to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted).

To defeat summary judgment, the nonmoving party must show more than a “metaphysical doubt as to a factual issue.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (quotation omitted). But “[a] party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006).

NP argues that the district court improperly dismissed its claims on summary judgment. The case appears to hinge on NP's latitude, pursuant to the declaration, to withhold approval of the 2017 plan. The declaration provides that NP's approval is required for improvements on lot 3, and that NP's “approval shall not be unreasonably withheld so long as such plans shall be substantially in accordance with Declarant's project

development plans submitted to and approved by [Burnsville] as part of the planned development of the Shopping Center.”

Thus, NP could not withhold approval of the 2017 plan if the 2017 plan was substantially in accordance with the 2004 plan. NP argues there are a number of fact issues precluding summary judgment, focusing on differences in the parking provisions between the 2004 and 2017 plans. The parties agree that the 2004 plan called for 249 parking spaces in lot 3; the 2017 plan, according to respondents, calls for 265 parking spaces. The district court determined that these two plans were substantially in accord because the number of parking spaces increased and both plans provide 1.2 parking spaces per bedroom.

NP contends that the 2017 plan does not, in reality, result in 265 parking spaces. NP points to a number of problems in the 2017 plan that it argues show there are only 227 parking spaces in the 2017 plan: (1) the spaces do not meet a city ordinance for parking space dimensions; (2) many of the spaces do not conform to industry design standards and thus are unusable; (3) the 2017 plans include “tandem” spaces; and (4) the 2017 plan incorrectly counts handicap-accessible spaces as two spaces. NP argues that these alleged problems create a genuine issue of material fact regarding the parking provisions in the 2017 plan. NP further argues that these assertions about the 2017 plan create a fact dispute over whether the 2017 plan is substantially in accordance with the 2004 plan.

The question here, however, is not how many usable parking spaces are in the 2017 plan, nor whether the spaces in the 2017 plan comply with city ordinances. Rather, the question presented is a narrow one: whether the 2017 plan is in substantial accordance with the 2004 plan. Although NP offered evidence showing alleged problems with the parking

provisions in the 2017 plan, it failed to offer evidence showing that the 2004 plan does not include the same alleged problems. We agree with the district court that NP ultimately offers no evidence showing that the 2017 plan differs from the 2004 plan and therefore cannot show that the plans are not substantially in accord. Because NP failed to show a genuine issue of material fact that the 2017 plan is not substantially in accord with the 2004 plan, summary judgment was proper.

NP's primary argument is that it reasonably withheld its approval of the 2017 plan pursuant to the declaration, but it makes several other arguments in an attempt to halt development on lot 3. We conclude these claims are without merit.

NP argues that a PUD requires a conditional-use permit (CUP), and because Burnsville did not grant Nicollet Plaza a CUP, Burnsville exceeded its zoning powers in designating Nicollet Plaza a PUD. The consequence of this argument, however, is that the PUD agreement, which was signed by all parties, including NP's predecessor, and enables Nicollet Plaza to exist, would be rendered invalid. Because we have determined that the district court correctly concluded NP did not reasonably withhold consent, NP may not now seek to have the PUD underlying the entire Nicollet Plaza project invalidated.

NP next asserts that respondents breached the PUD agreement by amending it without NP's consent. We agree with the district court that the evidence conclusively shows that an amendment to the PUD agreement does not require the signature of all parties; no amendment to the PUD agreement, historically, was signed by all parties. Thus, the district court properly concluded that no genuine issue of material fact exists related to the PUD agreement and the failure of all parties to sign amendments.

NP's final argument is that it is entitled to a permanent injunction based on the Opus-KSH purchase agreement. This agreement provides that lot 3 is to be constructed in accordance with the TIF agreement between KSH and Burnsville. It is the original TIF agreement which called for condominiums on lot 3. As noted above, the TIF agreement was amended in 2017 to permit construction of apartments on lot 3. Because the TIF agreement is between Burnsville and KSH, all amendments to it were signed only by Burnsville and KSH. NP argues that there is a genuine issue of material fact as to whether Opus agreed that the Opus-KSH purchase agreement would be subject to amendments in the TIF agreement. This, however, is a legal question of contract interpretation, and NP makes no legal argument that the TIF agreement cannot be amended. NP has not met its burden on appeal. *See Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944) (“[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal[] . . . [and] the burden of showing error rests upon the one who relies upon it.”).

In sum, NP failed to demonstrate a genuine issue of material fact or that the district court erred as a matter of law. We, therefore, affirm the district court.

Affirmed.