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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0256**

In the Matter of the Bette R. Peterson Revocable Trust,
Dated August 8, 1996, as Amended,

In the Matter of the Hewitt L. Peterson Revocable Trust,
Dated August 8, 1996, as Amended.

**Filed August 26, 2019
Reversed and remanded
Jesson, Judge**

Hennepin County District Court
File Nos. 27-TR-CV-15-233, 27-TR-CV-15-234

Rebecca A. Cymek, Severn, Maryland (pro se appellant)

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Denise S. Rahne, Robins Kaplan LLP, Minneapolis, Minnesota (for respondent David E. Peterson)

Casey Marshall, Alan Silver, Bassford & Remele, Minneapolis, Minnesota (for respondents Hewitt Peterson, Jr. & Angela Peterson)

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Rebecca Cymek challenges the district court's grant of summary judgment in favor of respondents Michael Murry and David Peterson on her claims related

to their activities as trustees of her parents' trusts. Because we conclude Cymek's breach-of-fiduciary-duty claim presents a genuine issue of material fact for a jury, we reverse and remand.

FACTS

Hewitt and Bette Peterson (the Petersons) had four children, including appellant Rebecca Cymek and respondent David Peterson. In 1996, they established the Hewitt L. Peterson Revocable Trust and the Bette R. Peterson Revocable Trust (collectively, the trusts).¹ Pursuant to the terms of the trusts, Hewitt and Bette Peterson each served as the trustee of their respective trust until Hewitt Peterson's death on July 23, 2011. Shortly after, Bette Peterson passed away in August 2011. The Petersons were survived by their four children and seven grandchildren.

Under the terms of the trusts, respondent Michael Murry became the trustee for both trusts upon Hewitt Peterson's death.² The Petersons requested that Murry, a certified public accountant who performed both personal and business work for the Petersons, serve as trustee after their deaths due to concerns that their children would not be able to get along.

In his capacity as trustee, Murry began distributing trust assets. The primary trust asset is an ownership interest in a company. That company owns a one-third interest in a

¹ Although there are two trusts involved in this appeal, the arguments are the same for each trust.

² Murry became the trustee for both trusts at the time of Hewitt Peterson's death because Bette Peterson's disability prevented her from serving as trustee of her trust.

14.4-acre, largely undeveloped property in Maple Grove (the Maple Grove property).³ In September 2011, Murry entered into a brokerage agreement authorizing the Maple Grove property to be sold for \$2 million. One month later, in October 2011, Murry hired a certified real-estate appraiser to assess the value of the Maple Grove property. The appraiser valued the Maple Grove property at \$125,000. In his affidavit, Murry stated he did not question this valuation because he believed that there was a development moratorium in place on the property at the time of the appraisal.

Murry served as trustee for both trusts for almost one year until his formal resignation on July 6, 2012. Murry's resignation stemmed from his indictment and guilty plea to criminal charges related to preparing a false corporate tax return for another client in an unrelated matter. After the other two successor trustees named in the trust agreements declined to act as trustee, Murry named David Peterson trustee.

Once David Peterson became trustee, the primary remaining trust asset to be distributed was the shares in the company that held the ownership interest in the Maple Grove property. And in September 2012, David Peterson extended the brokerage agreement for the property until the end of 2016, setting the list price at \$3.1 million. But David Peterson relied on the October 2011 \$125,000 valuation of the Maple Grove property he received from Murry when determining the shares to which each beneficiary was entitled. David Peterson also took into account the fact that Cymek received additional

³ Trust property also included a home in Maryland which was distributed to Cymek, various jewelry also in Cymek's possession, and gold coins sold for approximately \$20,000. Additionally, the Petersons owned 100% of the shares of an additional company, but distribution of those shares was addressed in separate litigation not before us in this appeal.

property—specifically the home in Maryland—that other beneficiaries did not receive. Based on the \$125,000 valuation of the Maple Grove property and the value of other property Cymek had already received, David Peterson concluded that Cymek was not entitled to receive any shares of the company holding the ownership interest in the Maple Grove property. Accordingly, in February 2013, he distributed the shares among the other beneficiaries.

Several years later, in May 2015, Cymek filed a petition with the district court alleging several claims against Murry and David Peterson, including claims for breach of fiduciary duty, conversion, and fraud. Cymek’s claims stemmed from her belief that Murry and David Peterson improperly distributed trust assets. She asked the district court to declare Murry’s and David Peterson’s actions null and void and impose a constructive trust.

In early 2016, Murry moved for summary judgment. Shortly after Murry filed his motion, Cymek supplemented her expert disclosures with an appraisal she obtained for the Maple Grove property. In the opinion of her appraiser, the Maple Grove property was valued at \$2.64 million in 2011. The district court granted summary judgment in favor of Murry on the conversion and fraud claims, determining that no evidence in the record demonstrated any fraud or conversion of trust assets. But it allowed Cymek’s claim for breach of fiduciary duty and her requests for declaratory relief and the imposition of a constructive trust to move forward.⁴

⁴ In December 2017, the district court denied David Peterson’s motion to Accept Final Accounting, Order Contribution, and Terminate trust, concluding that granting the motion would be unfairly dispositive, but noting that it would consider future summary judgment motions if additional discovery revealed that no genuine issues of material fact existed.

In March 2018, Murry, David Peterson, and Cymek all moved for summary judgment. In support of her motion for summary judgment, Cymek presented the district court with brokerage agreements for the Maple Grove property, signed originally by Murry and later extended by David Peterson, agreeing to list the Maple Grove property for around \$2 million in September 2011 and over \$3 million in September 2012, despite the \$125,000 valuation obtained in October 2011. After a hearing, the district court granted summary judgment in favor of Murry and David Peterson. In doing so, the district court concluded that Cymek did not present any evidence that Murry improperly or fraudulently valued the Maple Grove property, or that David Peterson improperly relied on the previous valuation when making distributions of trust property. The district court also noted that in reaching its conclusion, it did not consider the opinions of Cymek's experts because she failed to comply with statutory disclosure requirements. Subsequently, Cymek filed a motion for amended findings, which the district court denied. Cymek appeals.

D E C I S I O N

Cymek, who is self-represented, argues that the district court improperly granted summary judgment in favor of Murry and David Peterson.⁵ The central issue is whether there are any material, disputed facts regarding whether Murry and David Peterson breached their fiduciary duty by relying on the October 2011 appraisal valuing the Maple

⁵ Cymek also alleges that her former attorney committed fraud and was colluding with opposing counsel and the court to her detriment during the litigation. Because these arguments are not relevant to the question of whether the district court properly granted summary judgment, we do not address them.

Grove property at \$125,000. Based on the appraisal and Cymek's receipt of other trust property, David Peterson denied shares of the ownership interest in the company to Cymek.

We review a district court's grant of summary judgment de novo, evaluating whether genuine issues of material fact exist and whether the district court properly applied the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). In doing so, we view the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

A genuine issue of material fact exists if reasonable persons could draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). And a material fact is one whose "resolution will affect the outcome of a case." *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). But no genuine issue of material fact exists "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue." *DLH*, 566 N.W.2d at 71. Rather, the nonmoving party must present specific facts to satisfy its burden and "may not rely upon mere averments in the pleadings or unsupported allegations." *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

Here, the district court determined that there was no genuine issue of material fact regarding Cymek's claim that Murry and David Peterson each breached their fiduciary duty as trustee. Specifically, the district court stated it was

not aware of any evidence to support . . . Cymek's position that [the October 2011] appraisal was improper. [Cymek] admits that she disagrees with the valuation . . . but has no opinion as to the manner in which the appraisal was conducted. [Cymek]

also admits she has no basis to challenge the qualifications of [the appraiser].

Accordingly, the district court concluded that Cymek did not present any admissible evidence that Murry improperly or fraudulently obtained the valuation of trust property and that no evidence in the record suggested that David Peterson improperly relied on the valuation obtained by Murry.

In order to prevail on her claim of breach of fiduciary duty, Cymek must prove four elements: duty, breach, causation, and damages. *TCI Bus. Capital, Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 434 (Minn. App. 2017). Under Minnesota law, trustees owe trust beneficiaries several fiduciary duties. *In re Revocable Tr. of Margolis*, 731 N.W.2d 539, 545 (Minn. App. 2007). Those fiduciary duties include the duty of loyalty, the duty to act pursuant to the terms of the trust, a duty of full disclosure, and a responsibility to maintain a thorough accounting of their management of trust property. *Id.* at 545-46.

Cymek alleges that Murry and David Peterson breached their fiduciary duty by intentionally undervaluing the Maple Grove property, which caused her to suffer damages because she did not receive any shares of the company holding the ownership interest in the Maple Grove property due to the incorrect valuation. In support of her allegation, Cymek presented brokerage agreements for the Maple Grove property.⁶ One agreement,

⁶ We do not reach Cymek's arguments regarding the district court's exclusion of her expert witnesses' opinions because we do not view the appraisal done in 2016 as material to the question of whether Murry and David Peterson improperly and unreasonably relied on the \$125,000 valuation of the Maple Grove property.

dated September 2011 and signed by Murry, authorized the Maple Grove property to be sold for \$2 million. One month later, Murry received the \$125,000 appraisal of the property, but did not adjust the agreement. A second document, dated September 2012 and signed by David Peterson, extended the brokerage agreement until the end of 2016, setting the listing price of the Maple Grove property at \$3.1 million.⁷

These documents create a genuine issue of material fact about whether it was reasonable for Murry and David Peterson in 2011 and 2012 to accept and rely on the \$125,000 appraisal of the Maple Grove property. Although the district court found that Cymek conceded that she had no basis to challenge the qualifications of the appraiser and that she did not present any evidence that the appraisal was obtained fraudulently, those concessions do not preclude an issue of material fact as to whether the trustees intentionally undervalued the Maple Grove property. Our review of the 2011 and 2012 brokerage agreements lead us to conclude that a factual question remains about whether Murry or David Peterson had additional information beyond the appraisal about the value of the property based on the listing prices for the Maple Grove property—information which might lead a jury to conclude that either Murry, David Peterson, or both undervalued the property in breach of their fiduciary duty.

All parties presented significant evidence to the district court. A reasonable jury evaluating that evidence could decide in either party's favor. See *DLH*, 566 N.W.2d at 69

⁷ We note that an agreement in March 2017 maintained the \$3.1 million listing price. Finally, in January 2018, David Peterson entered into a purchase agreement for the Maple Grove property in the amount of \$2.525 million.

(stating that if reasonable persons could draw different conclusions from the evidence presented, a genuine issue of material fact exists). Because a genuine issue of material fact exists on the question of whether Murry and David Peterson breached their fiduciary duty by relying on the \$125,000 valuation of the Maple Grove property while simultaneously listing the same property for \$2 million, the question is appropriate for jury consideration.⁸

Reversed and remanded.

⁸ We do not find Cymek’s argument regarding the appointment of David Peterson as trustee persuasive, and we agree with the district court’s implied conclusion that Cymek waived the argument because it “was not raised until late in the proceeding.”