

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS**

A20-0335

A20-0744

Red Star Group, LLC, d/b/a Cheers,
Appellant,

vs.

1933 Lyndale, LLC,
Respondent.

Filed February 8, 2021

Affirmed

Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-19-19017

Jared M. Goerlitz, Goerlitz Law, PLLC, St. Paul, Minnesota (for appellant)

Rebecca F. Schiller, Jack E. Pierce, Bernick Lifson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant Red Star Group, LLC challenges the conditions the district court imposed on temporary injunctive relief and the grant of summary judgment dismissing this action involving the purchase of commercial real estate. Red Star argues that the district court

abused its discretion by requiring an excessive bond amount and erred by granting summary judgment on a basis respondent 1933 Lyndale, LLC did not assert. We affirm.

FACTS

Red Star agreed to purchase a commercial property it was leasing from 1933 Lyndale. Paragraph 4.0 of the July 2, 2019 purchase agreement required 1933 Lyndale to secure a commitment for title insurance, including copies of title-related documents (the title commitment) within three days. Paragraph 5.0 provided that “[w]ithin seven (7) days after receiving” the title commitment from 1933 Lyndale, Red Star “shall make written objections . . . to the content” of the title commitment, “if any.” Paragraph 5.0 further declared that “[a]ny matter disclosed” by the title commitment “and not objected to” by Red Star becomes a “Permitted Exception.” And Paragraph 11.0 provided that at closing, 1933 Lyndale was required to deliver “marketable fee simple title,” subject to “[a]ny ‘Permitted Exception.’” Closing was scheduled for October 30, 2019.

1933 Lyndale timely secured the title commitment for the property and provided it to Red Star. The title commitment excluded a 2013 mortgage in excess of \$2.3 million in favor of CorTrust Bank, N.A. (the CorTrust mortgage). Red Star did not object to the contents of the title commitment—including the CorTrust mortgage—within the seven days allotted under the purchase agreement. Accordingly, the draft limited warranty deed 1933 Lyndale prepared in advance of closing excluded the CorTrust mortgage.

In late October, Red Star expressed concern about the CorTrust mortgage and requested information about the payoff amount. The closing agent provided Red Star an unsigned copy of a partial release from CorTrust, which did not include a payoff amount.

An hour and a half before the scheduled closing, Red Star informed 1933 Lyndale that it would not accept title subject to the CorTrust mortgage. In response, 1933 Lyndale informed Red Star it had confirmed a payoff amount for the mortgage and again provided the partial release as well as assurances the CorTrust mortgage would be satisfied and released. Red Star did not appear at the closing, instead advising 1933 Lyndale that it had breached the purchase agreement by failing to provide marketable title.

Red Star later commenced this action alleging breach of contract and unjust enrichment, and seeking damages and injunctive relief. Red Star also moved the district court to issue temporary injunctions permitting it to remain in possession of the property during the litigation. The district court issued a temporary injunction conditioned on Red Star posting a bond in the amount of the purchase price and continuing to make the monthly lease payments, but Red Star failed to meet these conditions and the injunction was rescinded.¹

While this action proceeded, 1933 Lyndale brought an eviction action against Red Star. Red Star ultimately agreed to vacate the property and give up any rights to possession under prior leases between the parties. Red Star also voluntarily dismissed its claims for permanent injunctive relief in this action.

¹ At the hearing on Red Star's second motion for a temporary injunction, the district court noted that Red Star could have retained possession by posting a bond and paying rent, but failed to do so. The court declined to issue a second injunction, determining Red Star had not met its burden under *Dahlberg*. See generally *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314 (Minn. 1965).

In February 2020, 1933 Lyndale moved for summary judgment, arguing that it had complied with the purchase agreement and Red Star had not presented any material facts supporting its claims of breach. 1933 Lyndale attached the purchase agreement to its motion papers, and specifically argued, among other things, that the CorTrust mortgage did not render title unmarketable because it was a “Permitted Exception.” Red Star opposed the motion on the ground that 1933 Lyndale did not provide admissible evidence that it could have provided marketable title at closing.

The district court granted the motion, reasoning that the CorTrust mortgage was a “Permitted Exception” because Red Star failed to object within seven days of receiving the title commitment, 1933 Lyndale was prepared to provide marketable title at closing, and 1933 Lyndale had no obligation to clear the CorTrust mortgage from the title prior to closing. Red Star appeals the district court’s decisions on the temporary injunctions and summary judgment.

DECISION

I. Red Star’s breach-of-contract claim fails as a matter of law.

Summary judgment is warranted if “there is no genuine issue as to any material fact” and the moving party “is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. A party is entitled to summary judgment when the nonmoving party fails to establish an essential element of its claim. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), review denied (Minn. Oct. 16, 2001). There is no genuine issue of material fact if the record as a whole could not lead a rational decision-maker to decide for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We review

de novo whether there are genuine issues of material fact and whether the district court properly applied the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

To prevail on a claim for breach of contract, a plaintiff must prove “(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant.” *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011).

A. The district court did not sua sponte grant summary judgment.

Red Star contends that the district court erred because it granted summary judgment on its own theory rather than a theory 1933 Lyndale advanced in its motion. Red Star asserts that 1933 Lyndale sought summary judgment on the ground that Red Star did not establish the third element of its contract claim—breach—rather the second element—failure of Red Star to perform a condition precedent. This argument is unavailing for two reasons.

First, rule 56.06 expressly permits a district court to grant summary judgment “on grounds not raised by a party.” Minn. R. Civ. P. 56.06(b). And a court may “consider summary judgment on its own initiative after identifying for the parties the material facts that may not be genuinely in dispute.” Minn. R. Civ. P. 56.06(c). A district court may do so even where a party has brought a motion seeking summary judgment on other grounds. *See Septran, Inc. v. Indep. Sch. Dist. No. 271*, 555 N.W.2d 915, 920-21 (Minn. App. 1996) (affirming summary judgment in favor of the school district on a claim for which the district “did not move for summary judgment”), *review denied* (Minn. Feb. 26, 1997). This

case does not present disputed facts; its resolution turns on the interpretation and application of the purchase agreement. Thus the district court did not grant summary judgment sua sponte when its decision was based on the same purchase agreement identified by the moving party, even if its decision was based on a theory not raised by the moving party.

Second, 1933 Lyndale did seek summary judgment based on Red Star's failure to timely object to the CorTrust mortgage. In its supporting memorandum, 1933 Lyndale cited three provisions of the purchase agreement that define its obligation to provide marketable title, including Paragraph 5.0, which required Red Star to timely object to the content of the title commitment or any exception would become a "Permitted Exception." The district court cited and relied on the same three provisions in determining 1933 Lyndale did not breach the purchase agreement. The fact Red Star chose not to address them in responding to 1933 Lyndale's motion does not change the fact that 1933 Lyndale raised the arguments to the district court. The district court thus did not grant summary judgment on its own initiative or on grounds other than those advanced by the moving party.

B. 1933 Lyndale did not breach the purchase agreement.

Red Star does not contend that the terms of the purchase agreement are ambiguous. It only contests that 1933 Lyndale had provided competent evidence that the CorTrust mortgage would in fact be released at closing. Red Star otherwise does not dispute the sequence of events from the signing of the purchase agreement in July through its refusal to close on the purchase at the end of October. The undisputed terms of the purchase

agreement and the facts leading up to closing demonstrate 1933 Lyndale did not breach the purchase agreement.

The purchase agreement required 1933 Lyndale to deliver marketable fee simple title at closing. Red Star alleged that 1933 Lyndale did not meet this requirement because title was conditioned on the CorTrust mortgage. But the purchase agreement provides that title is not defective if it is delivered subject to a permitted exception. A “Permitted Exception” is any condition listed on 1933 Lyndale’s title commitment to which Red Star did not object within seven days. Red Star did not timely object to the content of the title commitment in any respect. The CorTrust mortgage thus became a “Permitted Exception”; it did not violate 1933 Lyndale’s contractual obligation to deliver marketable title. Moreover, 1933 Lyndale’s obligation was to deliver marketable title at closing, which did not occur because Red Star did not appear.² On this record, 1933 Lyndale did not breach the purchase agreement as a matter of law, because its obligation to deliver title had not

² Given that 1933 Lyndale’s duty to deliver title had not yet arisen when Red Star refused to appear for closing, Red Star appears to advance the theory of anticipatory breach—that 1933 Lyndale had demonstrated its inability to deliver marketable title, so Red Star was entitled to treat the purchase agreement as if it had been breached. *See Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 450 (Minn. 1980) (“Where a party to an executory contract places itself in a position where it cannot perform the contract, or where the party otherwise prevents performance of the contract, the other contracting party may treat the contract as anticipatorily breached.”); *Bell v. Olson*, 424 N.W.2d 829, 833 (Minn. App. 1988) (“In the absence of express unqualified repudiation, inability to perform may constitute anticipatory breach.”). Because Red Star did not argue anticipatory breach before the district court, it forfeited this argument on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” (quotation omitted)).

yet arisen and that obligation was subject to permitted exceptions such as the CorTrust mortgage.

II. Challenges relating to temporary injunctive relief are moot.

Red Star argues that the district court abused its discretion by conditioning the first temporary injunction on an excessive bond and refusing to issue a second temporary injunction. We need not consider these arguments in light of our decision affirming the dismissal of this action.

“An issue is moot if an event occurs pending appeal that makes a decision on the merits unnecessary or an award of effective relief impossible.” *Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. App. 2004) (quotation omitted). The purpose of temporary injunctive relief is “to preserve the status quo until judgment.” *Upper Midwest Sales Co. v. Ecolab, Inc.*, 577 N.W.2d 236, 244 (Minn. App. 1998). Because we affirm summary judgment dismissing Red Star’s action, injunctive relief is no longer necessary to preserve the status quo. In short, the entry of final judgment renders the issue of an injunction moot.

Affirmed.