STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1851

Red Wing Port Authority,
Respondent,

vs.

Osemi, Inc.,
Appellant.

Filed May 29, 2012
Affirmed
Kalitowski, Judge

Goodhue County District Court
File No. 25-CV-11-2279

George C. Hoff, Justin L. Templin, Hoff, Barry & Kozar, P.A., Eden Prairie, Minnesota (for respondent)

George L. May, Terence Garner O'Brien, May & O'Brien, LLP, Hastings, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Randall, Judge.*

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

KALITOWSKI, Judge

In this appeal from a judgment in an eviction dispute, appellant-tenant, a corporation, argues that (1) this court should review its defense claim of retaliation;

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

(2) the district court erred by relying on appellant's counsel's consent to the eviction petition and denied appellant due process of law by failing to get appellant's president's consent on the record; and (3) respondent's violation of the parties' agreement requires vacation of the judgment. We affirm.

DECISION

Respondent-landlord Red Wing Port Authority (RWPA) and appellant-tenant Osemi Inc. entered into a written lease agreement in February 2007 for a property located in Red Wing, Minnesota. In January 2010, RWPA and Osemi executed a Memorandum of Understanding identifying terms for Osemi's future purchase of the property. On June 1, 2011, RWPA gave written notice to Osemi to vacate the property by June 30, 2011. Osemi did not vacate the property, and RWPA commenced an eviction action. Before the district court held an evidentiary hearing, the parties reached an agreement: Osemi agreed to the allegations in the eviction petition, and RWPA agreed not to enforce the order and writ of recovery for 30 days. Consistent with this agreement, the district court issued the order and writ for recovery. For reasons not explained in the record, RWPA enforced the order and writ six days later. Osemi sought, and the court granted, a stay pending appeal, and Osemi appealed.

I.

Osemi alleges that RWPA's termination of the lease was in retaliation for Osemi's attempt to negotiate the purchase of the property according to its rights under the Memorandum of Understanding. Osemi argues that the issue of retaliation was raised before the district court because counsel discussed the ongoing negotiations between

Osemi and RWPA for Osemi's purchase of the property, referenced the Memorandum of Understanding that existed between the parties concerning the purchase, and asserted that, under the Memorandum of Understanding, Osemi had a right to purchase the property. Osemi asserts that making the court aware of these facts was equivalent to asserting a retaliation defense under Minn. Stat. § 504B.285, subd. 2 (2010). We disagree.

Osemi never alleged in the district court that RWPA's notice to quit was "intended in whole or part as a penalty for [its] good faith attempt to secure or enforce rights under a lease or contract." Minn. Stat. § 504B.285, subd. 2. Osemi neither filed an answer to the eviction petition alleging any defenses nor argued any defenses to the district court. Moreover, the Memorandum of Understanding is not part of the record, and nothing in the record indicates that the Memorandum of Understanding created a right of purchase or that Osemi attempted to enforce such a right. Additionally, because the record shows that RWPA disputed Osemi's assertion that the Memorandum of Understanding created a purchase right, the district court would have had to address this controlling factual dispute in order to address a retaliation defense. The court made no such finding, and its order does not mention a retaliation defense.

Osemi argues that even if this court determines that the retaliation defense was not raised in the district court, this court should consider the issue in the interest of justice. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele*

v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Although an appellate court has discretion to consider matters not raised before and considered by the district court, these occasions are "rare." *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390 (Minn. 1992); *see* Minn. R. Civ. App. P. 103.04 (stating appellate court may review matters "as the interest of justice may require").

> An appellate court may base its decision upon a theory not presented to or considered by the [district] court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in cases involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the [district] court on the question.
>
> Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was "implicit in" or "closely akin to" the arguments below; and the issue is not dependent on any new or controverted facts.

Roth v. Weir, 690 N.W.2d 410, 413-14 (Minn. App. 2005) (quoting *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687-88 (Minn. 1997)).

This case is not the "rare" circumstance in which this court will apply the exception to the general rule and consider Osemi's claim raised for the first time on appeal. Osemi concedes that the issue is not novel. And although Osemi raised the issue in its briefing to this court, the retaliation defense is not "closely akin" to Osemi's arguments in the district court; Osemi made no argument but agreed to the eviction petition. Finally, the retaliation defense is dependent upon facts not in the record. No facts supporting a retaliation defense were presented to the district court, and Osemi concedes that the record is void of facts necessary to review the issue. Osemi also

concedes that upon appellate review, the issue cannot be "decisive of the entire controversy on its merits," because Osemi asks that this court review the issue by remanding it to the district court where a factual record can be developed. *Roth*, 690 N.W.2d at 413-14. We therefore decline to consider the retaliation claim.

II.

Osemi contends that its counsel of record lacked the authority to agree to the eviction petition. At the outset of the evidentiary hearing scheduled on October 6, 2011, the parties told the district court they reached an agreement. Both Osemi's counsel and president appeared at the hearing via telephone. RWPA's counsel stated the agreement on the record. The court asked Osemi's counsel whether RWPA's counsel's recitation of the agreement was consistent with his understanding. He said it was and reiterated the agreement.

Osemi argues that because the district court did not ask Osemi's president to consent to the agreement on the record, counsel for Osemi did not have the legal authority to make the agreement. We disagree. "An attorney may bind a client, at any stage of an action or proceeding, by agreement made in open court . . . ." Minn. Stat. § 481.08 (2010). Osemi contends that section 481.08 imposes a duty on a district court to obtain express consent on the record from a corporation client to enter an agreement to an eviction petition. But Osemi provides no legal authority to support this proposition, other than the Minnesota Supreme Court's recognition that the statute "has been construed at various times not to authorize counsel to settle or compromise his client's right of action

without express authorization from the client." *Albert v. Edgewater Beach Bldg. Corp.*, 218 Minn. 20, 24, 15 N.W.2d 460, 463 (1944).

Osemi asserts this case is factually similar to *Aetna Life & Cas., Cas. & Sur. Div. v. Anderson*, 310 N.W.2d 91, 95-96 (Minn. 1981), in which the Minnesota Supreme Court reversed summary judgment because it was unclear whether the employer's insurer consented to the settlement of its subrogation claim. *Aetna* involved an employee's settlement of a worker's-compensation claim with a third-party tortfeasor, one attorney represented the employee and the employer's insurer, and no facts in the record established that the settlement was reached with the consent of the employer's insurer. 310 N.W.2d at 92, 95-96. Unlike *Aetna*, this case involves one attorney representing one client, it is an eviction matter involving only two parties, and counsel's agreement to the eviction petition on behalf of Osemi did not compromise another client's claim. No evidence in the record suggests that Osemi's counsel was not authorized to act on its behalf nor that counsel acted without Osemi's knowledge or consent.

Osemi also argues that it was denied due process by the district court's failure to obtain Osemi's president's consent to the agreement on the record. Due process is guaranteed by the United States and Minnesota Constitutions. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. "[P]rocedural due process guarantees reasonable notice and a meaningful opportunity to be heard." *In re Khan*, 804 N.W.2d 132, 137 (Minn. App. 2011). "Whether procedural due-process rights have been violated is a question of law, which we review de novo." *Id.*

"Generally, a corporation must be represented by a licensed attorney when appearing in court . . . ." *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 754 (Minn. 1992). Because the corporation is a distinct legal entity, an individual may not appear for a corporation. *Cary & Co. v. F. E. Satterlee & Co.*, 208 N.W. 408, 409 (Minn. 1926). *Nicollet* affirmed Minnesota's long-standing "common law rule that a corporation may appear only by attorney" and reiterated the significant rationale underlying the prohibition; the corporation, the court noted, "is an artificial entity which can only act through agents. 486 N.W.2d at 754. To permit a lay individual to appear on behalf of a corporation would be to permit that individual to practice law without a license." *Id.* Thus, the district court correctly allowed Osemi's counsel, rather than its president, to speak for Osemi on the record at the hearing.

III.

Osemi argues that RWPA violated the parties' agreement by seeking enforcement of the writ of recovery and order to vacate before the agreed-upon 30 days had expired. Osemi concedes that this issue was not raised before the district court and alleges this court should consider the issue in the interest of justice as permitted by Minn. R. Civ. App. P. 103.04.

RWPA asserts that the agreement to refrain from enforcing its right under the writ for 30 days was a separate, nonbinding "side agreement," and points to its absence in the district court's order. But the record indicates that the parties' resolution of the matter involved Osemi's agreement to the allegations in the eviction petition and RWPA's

agreement, on the record, to wait 30 days before enforcing the writ and order for recovery of the premises.

Osemi alleges that RWPA's breach of the agreement warrants a vacation of the judgment. Osemi further contends that RWPA's breach shows that its promise to wait 30 days was a fraudulent inducement that renders the agreement "a product of fraud," and requires that the judgment be vacated. We disagree.

Osemi's contention that RWPA's promise to wait 30 days is part of the legally binding agreement reinforces that Osemi should have raised the issue of any alleged breach before the district court. *See Myers v. Fecker Co.*, 312 Minn. 469, 474, 252 N.W.2d 595, 599 (1977) (stating that "vacating a stipulation of settlement rests largely within the discretion of the [district] court"). But Osemi failed to do so.

And importantly, Osemi cannot show any prejudice from RWPA's alleged violation of the agreement. *See Lundin v. Stratmoen*, 250 Minn. 555, 560, 85 N.W.2d 828, 833 (1957) ("No consideration will be given to alleged errors when no prejudice could possibly have occurred."). Had RWPA not prematurely sought enforcement of the writ and order for recovery, Osemi would have had lawful possession of the premises until November 5, 2011. Instead, by obtaining a stay pending appeal from the district court, Osemi has remained in possession of the property pending resolution of this appeal. Accordingly, Osemi is not entitled to additional relief.

Affirmed.