NEBRASKA SUPREME COURT

Nathan v. McDermott

306 Neb. 216 (2020) · No. No. S-19-637 · Decided June 26, 2020

SUMMARY

The Nebraska Supreme Court affirmed summary judgment for the sellers of a business and dismissal of claims against their agents. The court held that the purchase agreement's indemnification notice provision was unambiguous, that the buyers' misrepresentation claims arose from the same facts as their contract claims, and that the buyers could not prevail on recoupment. The court also affirmed promissory-note judgments for the sellers and the denial of attorney fees.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Cassel, J.; Heavican, C.J.; Miller-Lerman, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	June 26, 2020
DOCKET	No. S-19-637
DISPOSITION	affirmed
PROCEDURAL POSTURE	The buyers appealed from dismissal of their claims against the sellers' broker and agent under Neb. Ct. R. Pldg. § 6-1112(b)(6), summary judgment for the sellers on the buyers' claims and the sellers' promissory-note counterclaims, and denial of the buyers' recoupment defense. The sellers cross-appealed the denial of attorney fees and sanctions.
STANDARD OF REVIEW	Summary judgment is reviewed to determine whether the pleadings and admitted evidence show no genuine issue of material fact or ultimate inference and whether the movant is entitled to judgment as a matter of law, viewing evidence and reasonable inferences favorably to the nonmoving party. Dismissal on the pleadings is reviewed de novo, accepting well-pleaded allegations as true and drawing reasonable inferences for the nonmoving party. Contract interpretation and ambiguity are reviewed independently as questions of law. Attorney-fee decisions are reviewed for abuse of discretion.

PRECEDENTIAL VALUE	Published Nebraska Supreme Court decision; precedential.
PARTIES	Patrick S. Nathan, Kelsey M. Nathan v. Jason McDermott, Brandon Hoy, Chris Nielsen, Results Business Advisors LLC

TOPICS

contract interpretation · fraudulent inducement · negligent misrepresentation · summary judgment · motions to dismiss

PRACTICE AREAS

contracts · torts · civil procedure · appellate procedure · commercial litigation

QUESTIONS PRESENTED

1. Whether the purchase agreement's 45-day indemnification-notice provision was unambiguous and barred the Nathans' breach-of-contract claims because they were aware of their claims more than 45 days before giving notice.
2. Whether the Nathans' misrepresentation claims against McDermott and Hoy were independent tort claims or merely contract claims based on the same operative facts.
3. Whether the Nathans established recoupment as an affirmative defense to the sellers' promissory-note counterclaims.
4. Whether the Nathans stated claims for breach of fiduciary duty or misrepresentation against RBA and Nielsen despite the complaint's allegations that they acted as the sellers' agents and the purchase agreement's nonreliance provisions.
5. Whether the district court abused its discretion by denying sanctions and attorney fees.

HOLDINGS

1. The term "aware" in the purchase agreement was unambiguous and meant being informed, apprised, conscious, or cognizant of the claim, rather than possessing complete knowledge of every supporting fact. The Nathans were aware of their claims no later than October 9, 2015, and their December 15 indemnification demand was untimely under the 45-day notice provision.
2. The Nathans could not maintain independent misrepresentation claims because those claims arose from the same factual allegations and representations underlying their breach-of-contract claims. The tort allegations were surplusage.
3. The Nathans' recoupment defense was timely as a defensive matter and arose from the same transaction as the promissory-note counterclaims, but they failed to prove the underlying misrepresentation claim because they could not establish justifiable reliance or ordinary prudence.
4. The Nathans failed to state claims for breach of fiduciary duty or misrepresentation against RBA and Nielsen. Their complaint admitted that RBA and Nielsen acted as the sellers' agents, did not plausibly

allege a fiduciary relationship with the Nathans or conduct outside the agency relationship, and was subject to contractual nonreliance provisions.

5. The district court did not abuse its discretion in denying attorney fees and sanctions because the Nathans' interpretation of "aware" was incorrect but made in good faith and was not frivolous or undertaken in bad faith.

KEY QUOTATIONS

> *"A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms."* (306 Neb. at 230)

> *"But merely alleging both theories does not make them separate wrongs."* (306 Neb. at 231-232)

> *"Because the Nathans came across the same financial discrepancies, did not hire an independent accountant, ignored the recommendations of the lender, and closed the purchase 2 weeks early, no reasonable finder of fact could find that the Nathans exercised ordinary prudence and were justified in relying on McDermott and Hoy's misrepresentations."* (306 Neb. at 239)

FACTUAL BACKGROUND

The Nathans purchased all shares of Nebraska Medical Mart II, Inc. from McDermott and Hoy for $1.1 million, paying $990,000 at closing and executing promissory notes for the balance. Before closing, the Nathans received financial information and a lender's communication identifying numerous accounting discrepancies and recommending further investigation, a price reduction, additional contractual protections, and postponement of closing. The Nathans nevertheless closed early, did not hire an independent accountant, later identified additional discrepancies, and sent an indemnification demand more than 45 days after they had identified the discrepancies. They made no payments on the promissory notes.

PROCEDURAL HISTORY

The Nathans sued McDermott, Hoy, Results Business Advisors LLC, and Nielsen after purchasing Nebraska Medical Mart II, Inc., asserting breach of contract, bad faith, fraudulent and negligent misrepresentation, and breach of fiduciary duty. The district court dismissed the claims against RBA and Nielsen, granted McDermott and Hoy summary judgment on the Nathans' claims and on counterclaims for unpaid promissory notes, and denied attorney fees. After granting the Nathans' motion to alter or amend solely to address recoupment, the court left the judgment unchanged. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Adair Holdings v. Johnson, 304 Neb. 720, 936 N.W.2d 517 (2020)
- Merrick v. Fischer, Rounds & Assocs., 305 Neb. 230, 939 N.W.2d 795 (2020)
- DH-1, LLC v. City of Falls City, 305 Neb. 23, 938 N.W.2d 319 (2020)

- Guarantee Co. v. Mechanics' &c. Co., 183 U.S. 402, 420, 22 S. Ct. 124, 46 L. Ed. 253 (1902)
- Cimino v. FirsTier Bank, 247 Neb. 797, 530 N.W.2d 606 (1995)
- deNourie & Yost Homes v. Frost, 295 Neb. 912, 893 N.W.2d 669 (2017)
- Oriental Trading Co., Inc. v. Firetti, 236 F.3d 938 (8th Cir. 2001)
- Streeks v. Diamond Hill Farms, 258 Neb. 581, 605 N.W.2d 110 (2000)
- Knights of Columbus Council 3152 v. KFS BD, Inc., 280 Neb. 904, 791 N.W.2d 317 (2010)
- Schuyler Co-op Assn. v. Sahs, 276 Neb. 578, 755 N.W.2d 802 (2008)
- Funk v. Lincoln-Lancaster Cty. Crime Stoppers, 294 Neb. 715, 885 N.W.2d 1 (2016)
- Becker v. Hobbs, 256 Neb. 432, 590 N.W.2d 360 (1999)
- Ed Miller & Sons, Inc. v. Earl, 243 Neb. 708, 502 N.W.2d 444 (1993)
- Qualsett v. Abrahams, 23 Neb. Ct. App. 958, 879 N.W.2d 392 (2016)
- Cullinane v. Beverly Enters.-Neb., 300 Neb. 210, 912 N.W.2d 774 (2018)
- Zawaideh v. Nebraska Dept. of Health & Human Servs., 285 Neb. 48, 825 N.W.2d 204 (2012)
- Lucky 7 v. THT Realty, 278 Neb. 997, 775 N.W.2d 671 (2009)
- Schuelke v. Wilson, 250 Neb. 334, 549 N.W.2d 176 (1996)
- Rutledge v. City of Kimball, 304 Neb. 593, 935 N.W.2d 746 (2019)
- Deutsche Bank Nat. Trust Co. v. Siegel, 279 Neb. 174, 777 N.W.2d 259 (2010)
- Archbold v. Reifenrath, 274 Neb. 894, 744 N.W.2d 701 (2008)
- TNT Cattle Co. v. Fife, 304 Neb. 890, 937 N.W.2d 811 (2020)
- McCully, Inc. v. Baccaro Ranch, 284 Neb. 160, 816 N.W.2d 728 (2012)
- RAA Management v. Savage Sports Holdings, 45 A.3d 107 (Del. 2012)
- ABRY Partners V, L.P. v. F & W Acquis. LLC, 891 A.2d 1032 (Del. Ch. 2006)
- Suzuki v. Gateway Realty, 207 Neb. 562, 299 N.W.2d 762 (1980)
- Edwin Bender & Sons v. Ericson Livestock Comm. Co., 228 Neb. 157, 421 N.W.2d 766 (1987)
- Seldin v. Estate of Silverman, 305 Neb. 185, 939 N.W.2d 768 (2020)