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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT  
CIVIL DIVISION - MONAHAN, J.

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MINNESOTA PUBLIC RADIO,

PLAINTIFF,

v.

METROPOLITAN COUNCIL,

DEFENDANT.

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COURT FILE NO: 62-CV-10-988

**ORDER**

This matter was considered on 15 April 2010 by the Honorable M. Michael Monahan, District Court Judge, on Defendant's motion pursuant to Minn.R.Civ.P. 12.02(a) and 12.02(e) to dismiss the complaint. Court Docket 3.

Byron E. Starns, James G. Bullard, and Andrew W. Davis of Leonard Street and Deinard, P.A., appeared for Plaintiff ("MPR"). Mr. Starns argued.

Charles N. Nauen, William A. Gengler, and David A. Zoll of Lockridge Grindal Nauen, P.L.L.P., appeared for Defendant (the "Council"). Mr. Nauen argued.

Based on the entire record in this matter:

**IT IS ORDERED that:**

1. Defendant's motion is **DENIED**.
2. The following memorandum is a part of this order and constitutes the court's findings of fact and conclusions of law to the extent required by Minn.R.Civ.P. 52.01.

Dated: 3 May 2010.

  
M. Michael Monahan  
District Court Judge

## MEMORANDUM

### FACTS

#### Introduction

1. This is a breach of contract action. The contract at issue is entitled “Mitigation Agreement (MPR Broadcast Center, Saint Paul)”, dated 8 April 2009 (the “Agreement”). Court Docket 1 at Ex. A. The Agreement expressly incorporates a Mitigation Plan, dated 24 March 2009 (the “Plan”). *Id.*

#### Litigation

2. Litigation commenced on 4 February 2010. Court Docket 1. MPR asserts claims for: (a) Breach of Contract – Failure to Perform (Count 1); (b) Breach of Contract – Anticipatory (Count 2); and (c) Declaratory Judgment (Count 3).

3. This motion was noticed on 19 February 2010. Court Docket 3. The motion seeks: (a) the dismissal of Count 1 with prejudice; (b) the dismissal of Count 2 without prejudice; and (c) the dismissal of Count 3 with prejudice. Court Docket 3. The Council argues that: (a) Plaintiff’s claims are not justiciable and, therefore, the courts lack subject jurisdiction; (b) Defendant has not breached, nor anticipatorily breached, an unambiguous contract; and (c) Plaintiff’s claim for declaratory relief is invalid because it is based on remote future contingencies. Court Docket 8.

#### The Parties

4. MPR is a non-profit Minnesota corporation and one of the premier public radio broadcasters in the United States. Court Docket 1 at ¶ 8. Its headquarters and main broadcast center is located on Cedar Street, between 10<sup>th</sup> and 7<sup>th</sup>, in Saint Paul (the “Center”). *Id.*

5. The Council is the regional planning agency, created by Minn.Stat. ch. 473, serving the seven-county Saint Paul-Minneapolis metropolitan area. It provides, *inter alia*, certain services within the region. In that role, it owns and operates a public transportation system which includes a light rail system (“LRT”). The Council is in the midst of extending the LRT by adding

some 11 miles between downtown Minneapolis and downtown Saint Paul (the "Central Corridor").

#### **The Central Corridor**

6. The Central Corridor includes a part of Cedar, between 10<sup>th</sup> and 7<sup>th</sup>, abutting the Center. Court Docket 1 at ¶ 13.

7. MPR is concerned about the possible adverse effects that LRT operations would have on the quality of its broadcast and recording activities. Court Docket 1. The Center includes 32 recording, broadcast, and concert studios, as well as listening and sound editing facilities, each of which is highly sensitive to noise and vibration. Court Docket 1 at ¶¶ 14-16. Of particular concern is the potential impact of LRT operations in close proximity to highly sensitive broadcast and recording studios and equipment. Court Docket 1 at ¶ 18.

#### **Negotiations**

8. MPR expressed its concerns to the Council. In August 2008, MPR submitted comments on the Council's Draft Environmental Impact Statement pointing out that the study failed to appropriately analyze the noise and vibration impacts the Center and failed to consider alternatives or possible mitigation measures to reduce or eliminate the impacts. Court Docket 1 at ¶ ¶ 20 & 21. In December 2008, MPR reiterated its position regarding the inadequacies of the environmental review with respect to noise, vibration, and safety impacts to the Center. Court Docket 1 at ¶ 22.

9. In late January 2009, the Council brought to MPR's attention a mitigation technique known as a steel-spring floating slab track ("FST"). Court Docket 1 at ¶ 23. The steel-spring FST design had been used successfully in a similar situation in Basel, Switzerland, effectively mitigating noise and vibration caused by light rail trains operating in close proximity to an historic concert hall. Court Docket 1 at ¶ 23. Like the portion of Cedar abutting the Center, the Basil location has a grade approximating that of Cedar. Court Docket 1 at ¶ 27.

## The Agreement

10. The Agreement provides, *inter alia*:

The parties mutually agree to act in good faith and use their best efforts to address the mitigation issues described in the Mitigation Plan and this Agreement in a collaborative and cooperative manner.

Court Docket 1 at Ex. A at p. 8. It also provides that there is no commitment to a particular FST design and that the steel spring FST is one approach to be considered. *Id.* at p. 4.

11. The Plan provides, *inter alia*:

The Council commits to a process of coordination and consultation with MPR staff and their technical consultants, providing them timely opportunities to review vibration and ground-borne noise mitigation designs, and slab designs, as they are available.

Court Docket 1 at Ex A (Plan at p. 7).

12. The Plan states that:

The Council proposes to install the CCLST guideway on a floating slab, or its performance equivalent, for approximately 700 feet outside MPR and its neighboring churches. The mitigation technique has been proven in similar situations to isolate the vibration and ground borne noise created by LRT systems.

Court Docket 1 at Ex. A (Plan at 1). The Agreement and Plan require that the Council's FST design enable the Council to take reasonable operational and maintenance actions "within 48 hours' to reduce impacts to MPR. Court Docket 1 at Ex. A p. 6 and (Plan at pp. 4-6).

13. The Plan contains quantitative performance criteria that must be met by any FST design selected by the Council, including that "[g]round-borne noise from train operations and vehicular traffic crossing tracks shall not exceed the existing ambient L10 in recording and broadcast studios at any frequency between 16 Hz and 400 Hz." Court Docket 1 at Ex. A (Plan at p. 2).

14. The Council recognized that the MPR situation that was "unique and without precedent," and that "there exists no similarly situated properties or operations at any other point along the

proposed CCLRT corridor.” Court Docket 1 at Ex. A p. 7.

15. MPR agreed not to challenge the adequacy of the Final Environmental Impact Statement (“FEIS”). MPR has fulfilled its contractual obligation by not objecting to the FEIS, allowing the Federal Transit Administration to approve the CCLRT Project. Court Docket 1 at ¶¶ 30, 38, 44.

#### The Alleged Breach

16. MPR asserts that the successful Basel example is the type of mitigation method “with a proven track record” that formed the basis of its willingness to continuing discussions with the Council, which discussion ultimately led to the Agreement.

17. At some point after the Agreement was executed, MPR learned that the Council was considering a FST design using a rubber pad underlayment, rather than a steel-spring FST design similar to the one used in Basel. Court Docket 1 at ¶ 45. MPR alleges that the rubber pad FST falls far short of the design and performance criteria of the Agreement. Court Docket 1 at ¶ 46. MPR alleges that none of the examples brought to its attention by the Council are remotely similar to the conditions at the Center. Court Docket 1 at ¶¶ 26 & 47b. Thus, alleges MPR, the Council has selected a FST design that does not have a “proven track record” of mitigating ground-borne noise and vibration in similar situations. Court Docket 1 at ¶¶ 26 & 47.

18. On 17 December 2009, MPR informed the Council that it would consider the Council to have breached the Agreement if the Council submitted final construction or engineering plans based on a rubber pad FST design with no proven track record of effective mitigation. Court Docket at ¶ 48. On 21 January 2010, the Council stated that it was going forward with the rubber pad FST system. Court Docket 1 at ¶ 49.

19. MPR alleges that the Council has breached its “best efforts” obligation by: (a) selecting a rubber pad FST design with no proven track record of effective mitigation in similar situations, (b) selecting a FST design that will fail to meet the technical performance criteria set forth in the Agreement and Plan, (c) selecting a FST design based solely on cost considerations, and (d)

selecting a FST design that will prevent the Council from taking reasonable operational and maintenance actions within 48 hours to reduce impacts to MPR. MPR also alleges that the Council has breached its obligations to consult with MPR regarding the design of the FST mitigation design and coordinate with MPR and its staff.

**The Motion**

20. In its motion, the Council argues that: (a) MPR's claims of breach of contract and anticipatory breach of contract are not ripe; and (b) MPR's claim for a declaratory judgment should be denied or should be answered in the negative. Based on these arguments, the Council seeks dismissal pursuant to Minn.R.Civ.P. 12.

**LAW**

**Rule 12.02(a)**

21. In order for a court to have subject matter jurisdiction, there must be a justiciable controversy. *Rice Lake Contracting Corp. v. Rust Env't. & Infrastructure, Inc.*, 549 N.W.2d 96, 99 (Minn.App.1996). Justiciability requires: (a) a genuine or present controversy; (b) presented by persons with truly adverse interests; and (c) capable of specific rather than advisory relief by a decree or judgment. *Id.*

22. Where a plaintiff seeks a declaratory judgment, the "present controversy" factor of the justiciability inquiry is replaced by a more lenient "ripening seeds" inquiry. *Id.* Under the Minnesota Declaratory Judgments Act, a court has subject matter jurisdiction over a declaratory claim if the claimant "possesses a bone fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner." *Id.* Minnesota courts have held that a party need not wait until a contract is breached in order to assert a justiciable claim for declaratory relief.

**Rule 12.02(e)**

**23.** When deciding a motion to dismiss under Minn. R. Civ. P. 12.02(e), the court need only determine whether the complaint sets forth a legally sufficient claim for relief. *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 909 (Minn. Ct. App. 2009). When making this determination, “the court considers only the facts alleged in the complaint, accepting those facts as true, and construes all reasonable inferences in favor of the nonmoving party.” *Id.* A claim is deemed sufficient for purposes of withstanding a motion to dismiss under Minn. R. Civ. P. 12.02(e) if “it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn.App. 2007).

**Contracts**

**24.** The goal of contract interpretation is to ascertain the intent of the parties. *Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 364 (Minn.2009). When contract language is clear and unambiguous, courts should not “rewrite, modify, or limit its effect by a strained construction.” *Id.* at 364-65. Contract construction is a question of law, unless the contract is ambiguous. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn.2003). A contract is ambiguous if it is reasonably susceptible to two or more interpretations. *Id.* If a contract term is ambiguous, its interpretation is a question of fact, and extrinsic evidence may be considered to interpret the written terms of the contract. *Kunza v. St. Mary’s Reg’l Health Ctr.*, 747 N.W.2d 586, 591 (Minn.App.2008).

**25.** Under Minnesota law, an unconditional repudiation of a contract, either by words or acts, communicated to the other party prior to the time fixed for performance is an anticipatory breach. *In re Haugen*, 278 N.W.2d 75, 79 n.6 (Minn.1979). Where one party expressly renounces performance under the contract, before performance is due, and gives notice that he will not perform, the opposing party may treat the renouncement as a breach of the contract and

at once bring an action for damages. *Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 450 (Minn. 1980); *Friends of the Riverfront v. Minneapolis*, 751 N.W.2d 586, 593 (Minn.App.2008).

Whether there has been a repudiation of a contract that amounts to a breach is generally a question of fact. *Bradford v. Doherty*, 242 N.W. 339, 341-42 (Minn.1932).

#### **Declaratory Judgment**

26. Under the Minnesota Declaratory Judgments Act, “[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract.” Minn. Stat. § 555.02. “A contract may be construed either *before* or after there has been a breach thereof.” Minn. Stat. § 555.03. The purpose of the Declaratory Judgments Act is to “settle uncertainties prior to full-blown development.” *Holiday Acres No. 3 v. Midwest Fed. S & L Assoc.*, 271 N.W.2d 445, 447, 449 (Minn. 1978) (noting that the “prospect of lengthy litigation” makes declaratory judgment appropriate); *Culligan Soft Water Serv. of Inglewood, Inc. v. Culligan Int’l Co.*, 288 N.W.2d 213, 215-16 (Minn. 1979). The policy behind the creation of declaratory judgments is to allow parties to determine certain rights and liabilities pertaining to an actual controversy *before* it leads to repudiation of obligations, invasion of rights, and the commission of wrongs. *Id.* Declaratory judgments are therefore appropriate when withholding judgment would present claimants with an “impossible choice” between proceeding without a determination of their rights and accepting an unsatisfactory status quo. *Rice Lake Contracting Corp. v. Rust Env. & Infrastructure, Inc.*, 549 N.W.2d 96, 99 (Minn.App. 1996).

#### **DISCUSSION & DECISION**

##### **Standard**

27. The first question is the formulation of the legal standard applicable to this motion. The Council suggests that the standard for deciding Rule 12 motions under Minnesota law has undergone a recent change, or a change in emphasis. Court Docket 12 at p. 2. In that regard,



the Council directs my attention to *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn.2008) and *Bahr v. Capella Univ.*, 765 N.W.2d 428 (Minn.App.2009), *rev. granted* 11 Aug. 2009. I assume that the reference was based on those cases' citations of *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007). I do not read either case as establishing, or suggesting, that the standard as I have set it out in paragraphs 21-23 has changed. More to the point, *Bahr* cannot change the law because the Court of Appeals is an error correcting court; not a law making court. *Herbert* merely sights *Twombly* for the proposition that complaints must be something more than a list of legal conclusions, not, I suggest, a novel concept. I conclude that there has not been a material change in Rule 12 law in Minnesota. At best, I conclude that the Minnesota appellate courts have recently re-emphasized that complaints must have some modicum of the factual basis for the cause of action alleged.

**28.** I conclude that the complaint pleads claims of (a) breach of contract and (b) anticipatory breach in a manner that meets the standard of Rule 12 regardless of the formulation of the standard applied. The facts plead are sufficient to support the present breach claims in two respects by asserting that the: (a) rubber pad FST design does not have a proven track record in similar situation; and (b) the Council is not consulting and coordinating with MPR and its staff. Similarly, the complaint set out sufficient facts to satisfy whatever the Rule 12 standard is applicable to MPR's anticipatory breach claim.

**29.** In my view, the justiciability requirement for a declaratory judgment action is viewed with a degree of liberalism. To do otherwise is to cut off the remedial effect the legislature intended in adopting the statute. If a plaintiff possesses "a bone fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner", the matter is justiciable and, therefore, jurisdiction exists. *State v. Havland*, 25 N.W.2d 474, 477 (Minn. 1946)); *Holiday Acres*, 271 N.W.2d at 448 n.3. MPR's claims regarding the Council's FST design here falls within those limits.

**30.** This is a limited and technical decision. It should be read strictly. It is obvious that I have not addressed the Council's arguments regarding the meaning of the agreements' provisions at issue. In support of the Council's motion, Mr. Nauen advanced a close reading of their text. His arguments based on such a reading are weighty, significant, and entitled to careful consideration. Court Docket 8 & 12. As to those arguments, this decision only indicates that they are premature. I fully expect to revisit them and, I suspect, others in due course.

M.M.M.