UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:
LDM Development Corporation
Case No. BKY 96-36793

Debtor. Chapter 11 Case

LDM Development Corporation,

Plaintiff, ADV 97-3258

vs. ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

City of Minneapolis, a municipal corporation, and the Minneapolis Community Development Agency,

Defendants.

This adversary proceeding came on before the Court on July 14, 1998, for hearing on the Defendants' motion for summary judgment. Stuart R. Brown appeared for the Defendants and Steven Weintraut appeared for the Plaintiff. Upon the motion before the Court, the supporting affidavits and exhibits, counsels' memoranda and argument, and being fully advised in the matter, the Court makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I. Introduction

The Plaintiff LDM Development Corporation (LDM) renovates and manages rental property in the city of Minneapolis (the City). LDM filed for chapter 11 protection on November 11, 1996, The Debtor's plan of reorganization, dated October 22, 1997, was confirmed by the Court on October 23, 1997. The bankruptcy case was closed on May 26, 1998.

This adversary proceeding was brought by Debtor LDM against the City on September 24, 1997, to resolve claims arising from the loss of nonconforming status, condemnation, and subsequent demolition of improvements of property at 1701 Central Avenue N. E., Minneapolis, Minnesota (the Central Avenue property). LDM seeks recovery against the City(1) on a number of theories, all related to discussions and negotiations LDM officials had with various members of the City's

staff. Specifically, LDM seeks damages of as much as $115,000 on nine counts relating to loss of nonconforming use status of the property: Declaratory judgment against the City; promissory estoppel against the City and MCDA; breach of contract by MCDA; unjust enrichment to MCDA; intentional misrepresentation by MCDA; constructive fraud by MCDA; negligent misrepresentation by MCDA; and, breach of fiduciary duty by MCDA.

II. Summary judgment standard

The City seeks summary judgment under FED. R. CIV. P. 56 and FED. R. BANKR. P. 7056. FED. R. CIV. P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. Evidence of the non-moving party "is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S 242, 255 (1986); see also, Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The question for the Court is whether a fair minded jury or rational trier of fact could return a verdict for the non-moving party. A mere scintilla of evidence, inadequate to support a verdict for the non-moving party, is not enough. See, 477 U.S. at 250-252; and Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 586-587 (1986).

III. Facts for summary judgment

The Plaintiff, LDM, purchased 1701 Central Avenue N. E., Minneapolis, Minnesota (the Central Avenue property) in August 1994 for the purpose of renovation and operation, or alternatively, sale to the city of Minneapolis. The LDM Development Corporation, run by David and Leone Medin, had experience with renovating and operating rental properties in the city of Minneapolis. The Plaintiff also provided management services to the owners of other apartment buildings in Minneapolis.

Within a few days of purchasing the Central Avenue property, LDM was contacted by a member of the Minneapolis Police Department who expressed concern over a history of drug trafficking and other safety concerns at the building. At police suggestion, LDM closed and boarded the building on September 21, 1994.

LDM also had a number of conversations and meetings with Richard Warwick, a Minneapolis inspector, about health and safety violations at the Central Avenue property. Mr. Warwick suggested LDM contact the MCDA about selling the building, and put LDM in contact with James White at MCDA. At least one of Mr Warwick's meetings with LDM was attended

by Tom Bordwell, an assistant to city councilman Walter Dziedzic. LDM received assurances that sale to the city would be simpler if no further improvements or repairs were made to the building.

At roughly the same time as the discussions about health and safety concerns, LDM negotiated with James White at MCDA about MCDA's possible purchase of the Central Avenue property. LDM understood from its meetings and discussions that purchase by Minneapolis was part of a redevelopment scheme that would involve tearing down the building for use as a parking lot.

Over the next several months Mr. White assured LDM that a sale was imminent and that LDM should make no further investments in the building. In June of 1995 LDM requested a written confirmation of MCDA's intentions and received a letter from Mr. White indicating that an appraisal was needed to prepare a formal offer. LDM requested an appraisal which was delivered to the MCDA in September of 1995 indicating a value of $26,600. Mr. White offered to recommend that price to the MCDA Board (The Minneapolis City Council) but LDM indicated the price was unacceptable.

At all times during the discussions and negotiations concerning the Central Avenue property, the Minneapolis City Council, as a body, remained the only authority authorized by the City to make a formal offer for purchase. None was ever made.

In addition to discussions with Mr. Warwick (city inspections), Mr. White (MCDA), and Mr. Bordwell (city council staff), LDM received its first letter from Allan Olson, Hazardous Building Inspector, in November or December, 1994. Mr. Olson noted that since the Central Avenue property was a boarded building, LDM would need to pay a $2000 cash deposit for a code compliance inspection before the building could be occupied. In April of 1995 Mr. Olson sent another letter to LDM about the boarded status of the Central Avenue property warning that the building could be declared a nuisance under the Minneapolis Code of Ordinances, Chapter 249.

In April of 1995 the State of Minnesota obtained a judgment against the Central Avenue property for delinquent 1994 taxes. The property eventually became tax forfeited.

In the meantime, after further letters, Mr. Olson recommended to the City Council that the Central Avenue property be demolished as a nuisance. LDM received a notice of hearing and opposed demolition at the May 1, 1996 meeting of the Public Safety and Regulatory Services Committee. The committee noted that there were 35 structural orders, 10 housing code orders, and 17 environmental orders outstanding on the building. On the committee's recommendation, and over LDM's objections, the City Council voted to demolish the building on May 10, 1996, and the Mayor signed the order for demolition on May 16, 1996. The building, although not immediately destroyed, was eventually

razed in November 1996.

The Central Avenue property contained eight units when it was purchased, although the zoning code then in effect only allowed five.(2) The building could continue to operate as a legal, pre-existing, nonconforming use (Minneapolis, Minn., Code of Ordinances Title 20, Section 531.20 (1998),) although the property has since lost its nonconforming use status, as of at least November 1996, when the building was demolished.

> LDM was unaware of [the] pre-existing nonconforming use status until Leone Medin called the City tax department in late August 1995. She asked them what LDM needed to do to avoid tax forfeiture. The City told Leone Medin that because the building had been boarded up for over a year, LDM would need to convert the building to a five-unit building before it could operate it again as a rental property. That was the first time LDM became aware of the pre-existing non-conforming use status." (Pl.'s Resps. to Interrogs. #7(a).)

According to LDM, increased cost of renovations that the city claimed were necessary to bring the property into compliance with the then existing zoning requirements made restoration uneconomical. LDM alleges damages between $110,000 and $115,000, representing the difference in cost between renovating the Central Avenue property as a pre-existing nonconforming use, and the cost of renovating the building to meet the then applicable zoning requirements.

In July of 1996 LDM brought an action in Hennepin County District Court to prevent demolition of the Central Avenue property. In an Order dated October 10, 1996, denying LDM's motion for a temporary injunction, and rescinding the district court's temporary restraining order, the Honorable Dolores C. Orey, Judge of District Court, issued findings of fact and conclusions of law addressing most, if not all of the claims brought by LDM in this adversary proceeding.(3)

IV. Loss of nonconforming use - LDM's failure to seek administrative remedies fatal to this action

The only damages pled by LDM in this lawsuit arise from the loss of the Central Avenue property's pre-existing nonconforming use. LDM does not make a claim for the price paid for the property(4), or the value of the building destroyed under the city's police powers. Accordingly, when and how the Central Avenue property lost its nonconforming use is critical to an evaluation of LDM's claims. Such a determination is a matter of law, not fact. SLS Partnership v. City of Apple Valley, 496 N.W.2d 429,

430 (Minn. Ct. App. 1993).

LDM admits that the company took no administrative steps to preserve the nonconforming use. "LDM did not choose to pursue any administrative remedies, as it believed a sale was imminent." (Pl.'s Summ. J. Mem., at 5.) The city of Minneapolis points to LDM's failure to seek administrative relief as a failure to mitigate and an absolute bar to recovery for any claim arising from a loss of zoning status.

In Minneapolis, nonconforming uses are regulated by the zoning code: "The purpose of this chapter is to regulate the continuing existence of legal nonconforming uses and structures[.]" (Minneapolis, Minn., Code of Ordinances Title 12, Section 531.10 (1998).) Section 531 contains details on establishing nonconforming rights by applying for a certificate of nonconforming use (Id. at. Section 531.30,) discontinuance (Section 531.40), and the procedure for appealing decisions of the Minneapolis Planning Commission (Chapt. 531.50(g)) or Board of Adjustment "to the city council and the right of subsequent judicial review as specified in Chapter 525." (Id. at Section 531.50(g).)

By LDM's own admission, the corporation never sought a certificate of nonconforming use, nor petitioned for a determination of its rights under the zoning code. LDM argues that pursuing administrative remedies could have accomplished nothing, and that the Plaintiff was not required under the law to undertake a futile administrative procedure.

While it is clear that such a petition would have been futile after the building was destroyed, (Id. at Section 531.40,) LDM's presumption that the nonconforming use was lost before the property was tax forfeited and torn down as a public nuisance is invalid.

> [I]f the nonconforming use is discontinued for a continuous period of (1)one year, it shall be deemed to be abandoned . . . A property owner may rebut the presumption of abandonment only by presenting clear and convincing evidence that discontinuance of the nonconforming use for the specified one-year period was due to circumstances beyond the property owner's control. (Id. at Section 531.40(1))

The Minnesota Court of Appeals reviewed a very similar fact situation in Hunkins v. City of Minneapolis, 508 N.W.2d 542, (Minn. Ct. App. 1993). In Hunkins, the court of appeals asked "May a district court refuse to decide a property owner's takings claim where the owner has not sought a final determination regarding application of the zoning to the property?" Id. at 544. The court noted: "until the administrative agency has arrived at a final, definitive position regarding how it will apply the

regulations at issue to the particular land in question" the court cannot measure damages. Id.

LDM's argument that "[u]nder Minnesota law, a party needn't resort to administrative remedies if doing so would accomplish nothing" (Pl.'s Mem. in Opp'n to Summ. J., at 13,) was also rejected in Hunkins. Instead, LDM relies upon McKee v. Ramsey County, 245 N.W.2d 460, 462 (Minn. 1976); and Medical Services, Inc. v. City of Savage, 487 N.W.2d 263, 266, (Minn. Ct. App. 1992). But in both cases, the plaintiffs did seek administrative relief. In McKee the plaintiffs made two separate administrative requests, and in Medical Services, Inc. the plaintiff had submitted to the city of Savage's zoning procedures and received a finding of facts from the city council indicating further administrative review would be futile.

What is reiterated in Hunkins, McKee, and Medical Services, Inc., is that where the relief sought is not available from an administrative process, a party need not submit to that process. In this case, LDM claims that the property could no longer be developed economically without the pre-existing nonconforming use in place. The Minneapolis Code, Chapt. 531, provided a mechanism for continuing that use.

The Hunkins court rejected an argument almost identical to LDM's: "[T]wo years after the property forfeited to the state, Hunkins attempts to draw a causal link between the zoning restrictions and the demise of his development. He contends that the City's actions, in conjunction with the MCDA and the MTCC, constituted a final determination and that requesting a variance or special use permit would have been futile." 508 N.W.2d at 544. "That Hunkins never obtained a final determination was undisputed. Therefore, the district court properly granted summary judgment." Id. at 545.

LDM's failure to pursue the available administrative remedies for preserving the Central Avenue property's nonconforming use is fatal to this action. Even if this failure was not determinative of LDM's action as a matter of law, the individual claims fail as a matter of law for the reasons discussed below.

V. Claim one: declaratory judgment against the City

LDM argues that "the City's decision to proceed with demolition of the Central Property is arbitrary, capricious and unreasonable, and is therefore invalid and void." (Am. Compl., #31,) "Land use decisions are entitled to great deference and will be disturbed on appeal only in instances where the City's decision has no rational basis." Super America Group, Inc., v. City of Little Canada, 539 N.W.2d 264 (Minn. Ct. App. 1995). In reviewing the actions of any city in the application of its land use police powers, the court will only set

aside decisions that have no rational basis. See, White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn. 1982). "The court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked." 324 N.W.2d at 175.

The City cited "35 structural orders, 10 housing orders, and 17 environmental orders" (Findings of Fact, Conclusions and Recommendation, May 9, 1996,) in making its decision to raze the building. This decision, under the Minneapolis Code, Section 249, was contested administratively by LDM. LDM's failure to challenge a single fact or conclusion in that record is fatal to this claim. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

LDM also seeks declaratory judgment for the City's purported action under Minneapolis Code, Section 531 relating to loss of the nonconforming use status. As discussed in IV above, LDM's earlier failure to pursue its available administrative remedies prevents it from now challenging the Central Avenue property's zoning status under Section 531. Without a Minneapolis decision to review, there is no subject matter jurisdiction to hear this part of LDM's claim. "This court lacks jurisdiction over the subject matter of the complaint because plaintiff has failed to exhaust administrative remedies[.]" Minnesota v. O'Neal, 472 F.Supp 905, 907 (D. Minn. 1979); see also, Myers v. Bethlehem Ship Bldg. Corp., 303 U.S. 41 (1938).

VI. Claim two and three: promissory estoppel

LDM seeks to estop the City from claiming the Central Avenue property "has lost its status as a pre-existing nonconforming use." (Am. Compl., #34.) LDM's argument that the corporation "relied upon the City's assurances that its purchase of the Central Avenue Property was imminent" (Id.,) should have been heard in an administrative proceeding as specified by the Minneapolis Code, Section 531. As discussed in IV above, this court cannot review a proceeding which did not occur.

Even if LDM had other damages arising from the City's representations, the Plaintiff must show a reasonable reliance upon City representations or inducements to invoke equitable estoppel. "a party seeking to invoke the doctrine of equitable estoppel has the burden of proving three elements: (1) that promises or inducements were made; (2) that it reasonably relied upon the promises; and, (3) that it will be harmed if estoppel is not applied. Hydra-Mac v. Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990) quoting Northern Petrochemical Co. v. U.S. Fire Ins. Co., 277 N.W.2d 408, 410 (Minn.1979). Estoppel is rarely applied in cases against municipalities. See, Jasaka v. City of St. Paul, 309 N.W.2d 40, 44 (Minn. 1981).

LDM argues that it pursued two separate business

strategies with the Central Avenue property: sale to the City; or, redevelopment as a rental property. LDM claims that because the corporation relied on statements made by city officials in the course of sales negotiations, LDM failed to take actions which foreclosed its redevelopment options. Additionally, LDM argues that whether such a reliance was reasonable is a question of fact.

LDM claims that the City represented that a sale "was imminent," but admits that no agreement was ever reached on price. On June 17, 1995, LDM received a letter from the MCDA indicating the preliminary nature of negotiations, the need for a formal appraisal, and that a formal offer to purchase the Central Avenue property could only come from the Board of Directors.

The equitable claim in this case is less compelling then the one advanced by the plaintiff in Plymouth Foam Products, Inc. v. City of Becker, Minnesota, 120 F.3d 153 (8th Cir. 1997). In that case "[t]he parties disagree[d] over whether an enforceable agreement was ever reached." 120 F.3d 153. An agent of the city of Becker had also represented that an agreement actually existed. The court noted:

> Plymouth Foam's breach of contract claim must fail because there is no contract to enforce. Under Minnesota law a municipality may enter into a contract only if authorized by its city council. Minn.Stat. Ann. Section 412.201 (West 1994). . . . Plymouth Foam does argue, however, that the city should be estopped from claiming there was no contract because Graning had made earlier representations that an agreement existed and that MDTED had agreed to provide $150,000. Id. at 156.

LDM's arguments to the contrary, it was unreasonable to rely on any city employee's representations, short of a city council resolution, that a sale was promised.

> Even if Graning's representations could be attributed to the city, Plymouth Foam's reliance on those representations was not justified. "All persons contracting with a municipal corporation are conclusively presumed to know the extent of the authority possessed by the officers with whom they are dealing," because the law and public records give other parties constructive notice of the powers and functions of such officers. Graning was not authorized to contract on behalf of the city or to speak definitively about what the city council had or had not approved. Roberts is a sophisticated businessman and

> part owner of a multi-million dollar company, and the law, public records, and his experience with the earlier incentive package approved by the city council put him on notice about what was required to reach an agreement with the city. Reliance on the oral statements of a city employee regarding the terms or status of an agreement of this type and magnitude was not justified. Id. at 157, citations omitted.

LDM was a corporation in the business of renovating and managing rental property, and it had extensive experience operating in the city of Minneapolis. Any reliance that LDM placed on the assurances of city employees was misplaced.

VII. Claim four: breach of contract by the MCDA

The Plaintiff argues that "MCDA and LDM entered into an oral contract for MCDA's purchase of the Central Property." (Am. Compl., #38.) LDM does not specify when this occurred, or what price was agreed upon for the Central Avenue property.

The Minnesota Statute of Frauds states:

> No estate or interest in lands, . . . nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing. Minn. Stat. Ann. Section 513.04 (1998)

It is well established law in Minnesota that an offer to purchase real property must be in writing to be enforceable. See, Pierce v. Clarke, 73 N.W. 522 (Minn. 1898). The only writing in the record concerning a sale of the Central Avenue property is the June 17, 1995 letter from James White at the MCDA to LDM. The letter indicates the preliminary nature of negotiations, the need for a formal appraisal, and that a formal offer to purchase the Central Avenue property could only come from the Board of Directors (city council).

A contract for the sale of real property must also be in writing. "Every contract for . . . any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made, or by the party's lawful agent thereunto authorized in writing[.]" Minn. Stat. Ann. Section

513.05 (1998). There is no writing in this case that fulfills the contract requirements of Minnesota law. LDM admits that the only offer the corporation received was an oral one. The Plaintiff also admits that the offer was rejected as inadequate. The City could not breach a non-existent contract.

VIII. Claim five: unjust enrichment to the MCDA

LDM claims that the City was unjustly enriched because "MCDA unlawfully induced LDM to forego renovating the Central Property thereby rendering the Central Property ripe for condemnation without cost to MCDA." (Am. Compl., #41,) In VI above, the Court has already determined that it was unreasonable for LDM to rely on any oral representations or "inducements." While LDM offers no legal authority for this claim, the City concedes that "[t]he theory of unjust enrichment would obligate the repayment based upon a moral obligation where the party has received without consideration the money of another which they have no right to retain." (Mem. in Supp. of Summ. J., at 17, quoting 8 Dunell Minnesota Digest 2nd, Contracts, S 2.07(c) (4th edition 1990).) The record indicates that the property was condemned for unpaid property taxes, and that the City paid to have the building on the Central Avenue property razed as a public nuisance (see footnote 4). Even if LDM could establish an equitable argument for unjust enrichment, which it cannot, there is no basis to support LDM's contention that the property could be condemned "without cost" to the City.

IX. Claims six and eight: intentional and negligent misrepresentation by the MCDA

"In Minnesota, an actionable misrepresentation requires proof either that the misrepresenter acted dishonestly or in bad faith, i.e. with fraudulent intent, or, alternatively, that the misrepresenter was negligent." Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986). LDM concedes that "actual and justifiable reliance" is a required element of an action for misrepresentation.(5) As discussed in VI above, this Court has already determined that LDM was not justified in its reliance upon the statements of city officials.

LDM argues that the misrepresentation it seeks recovery for is the promise of imminent sale of the Central Avenue property. LDM asserts that the issue of reasonable reliance is a question of fact which should not be resolved on summary judgment.

> The issue presented here is whether the trial court properly concluded as a matter of law that Veit could not justifiably rely on Anderson's alleged oral representations given the "contradictory" provisions of the written agreement. Reliance on oral

representations is unjustifiable as a matter of law "only if [a] written contract provision explicitly stated a fact completely contradictory to the claimed misrepresentation." Johnson Building Co., 374 N.W.2d at 194, citing Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 179 (8th Cir.1971). Veit v. Anderson, 428 N.W.2d 429, 433 (Minn. Ct. App. 1988).

As detailed before, LDM received a letter from James White on June 17, 1995, which clearly contradicted any representations that a sale was imminent. It also placed LDM on notice that only the city council could make a binding offer of sale. The rule in Veit makes summary judgment appropriate in this situation. Alternatively, any representations that LDM did not need to comply with work orders or letters concerning code violations at the Central Avenue property, were clearly contradicted by the written communications LDM received.

Any damages that might have been suffered through the loss of the nonconforming use, or the eventual destruction of the building as a public nuisance, were due to the inaction of LDM, not the representations of any Minneapolis officials.

X. Claims seven and nine: constructive fraud and breach of fiduciary duty by MCDA

LDM's claims for constructive fraud and breach of fiduciary duty both rely on a finding that Minneapolis officials were in a special relationship of trust with LDM that created a fiduciary duty. "Constructive fraud reposes exclusively in the context of fiduciary obligations and is simply a characterization of a breach of such duty." Perl v. St. Paul Fire and Marine Insurance Co., 345 N.W.2d 209, 213 (Minn. 1984), citing R. Mallen & V. Levit, Legal Malpractice Section 108 at 188 (1981).

LDM cites four cases in asking the Court to create a relationship of special trust where Minnesota courts have failed to recognize a fiduciary duty in the past: Perl v. St. Paul Fire and Marine Insurance Co., 345 N.W.2d 209, 213 (Minn. 1984); Parkhill v. Minnesota Mutual Life Insurance Co., 995 F. Supp. 983, 991 (D. Minn. 1998); Toombs v. Daniels, 361 N.W.2d 801, 809 (Minn. 1985); and Cherne Contracting Corporation v. Wausau Insurance, 572 N.W.2d 339, 343 (Minn. Ct. App. 1997).

In Perl the court reviewed a lawyer client relationship to see if the client could establish a claim of fraud. That type of close fiduciary relationship is not evident in this case.

In Parkhill the defendant was the plaintiff's insurance agent on an insurance policy where the plaintiff and defendant had a pre-existing business relationship. The plaintiff had a contract, unlike LDM's case here, and the issue of the fiduciary

relationship was deemed a question of law.

In Toombs the court examined whether a fiduciary relationship could exist between a potential beneficiary of a trust and the trustees. It is difficult to extend those facts to the case at hand. In fact, none of the cases cited by LDM involve two parties negotiating the type of arm's length transaction found in this case.

Plaintiff cites Cherne Contracting Corporation v. Wausau Insurance, 572 N.W.2d 339, 343 (Minn. Ct. App. 1997) as authority that summary judgment is inappropriate, claiming whether or not Minneapolis owed LDM a fiduciary duty is a question of fact. In Cherne the Minnesota Court of Appeals affirmed the district court's finding that an insurance company owed no fiduciary duty to the insured.

> Cherne cites evidence that Wausau was using Cherne's funds to handle claims, that Cherne relied on Wausau's expertise and invited confidence, and that Wausau's attorneys defended Cherne as a client. But this, without more, is insufficient to establish a prima facie case of a fiduciary relationship. The reality is that a relationship created by an insurance contract necessarily involves competing interests, which often generate litigation between the insurer and insured. Without a showing by Cherne that Wausau was aware of Cherne's trust and confidence, the parties' relationship was not compatible with the concept of a fiduciary. See Klein v. First Edina Nat'l Bank, 293 Minn. 418, 422, 196 N.W.2d 619, 623 (1972) (concluding that to establish prima facie case of fiduciary relationship, plaintiff should produce evidence that defendant should have known plaintiff was placing trust and confidence in defendant; 20 year business relationship insufficient as proof of confidential relationship)." Id. at 343.

LDM was trying to negotiate a sale with the MCDA, but did not yet have an agreement. As a matter of law no fiduciary relationship existed. It is undisputed that these parties never arrived at a mutually agreeable price, and it is easy to see why Minneapolis officials might suggest LDM make no improvements. For LDM to rely on those representations, made in the context of trying to facilitate a sale, in evaluating what needed to be done to preserve their rights if they retained the Central Avenue property, was not reasonable given the written notices they received. Both parties understood that any improvements were likely to make a sale less likely. Both parties understood that the City did not need or want the existing building on the Central Avenue property. LDM needed to

protect its own interests, the City had no fiduciary responsibility to such an experienced and sophisticated actor. Under the reasoning in Cherne, LDM has failed to "establish a prima facie case of a fiduciary relationship." Id.

XI.

Based on the foregoing, it is hereby ORDERED: The Defendants' motion for summary judgment on all counts is granted, and the Plaintiff takes nothing from this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 17, 1998 By the Court:

_____
Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

(1) LDM's Amended Complaint names the city of Minneapolis, a municipal corporation, and the Minneapolis Community Development Agency (MCDA). Certain counts are directed at "the City" (One, and Two), others (Three, Four, Five, Six, Seven, Eight, and Nine) are directed only at the MCDA. The Defendants insist that they are separate entities, and that actions of one cannot be imputed to the other. While this argument may have merit, its determination involves issues of fact better left to trial. For the purposes of this motion the Court assumes the city of Minneapolis and the Minneapolis Community Development Agency are one entity.

(2) It is unclear from the record whether the building's nonconforming status was due to lot coverage, set-back, or number of units, nor is it important for purposes of this motion.

(3) Because that case was dismissed without prejudice by LDM in August of 1997, and because the October 10, 1996 order was not a final judgment, this Court is not bound by the earlier findings.

(4) The pleadings provide no detail as to the price paid for the building, the cost to the city of Minneapolis to have the building destroyed, or the amount of outstanding property taxes due at the time of forfeiture. The pleadings do indicate that the City of Minneapolis offered to purchase the building for $28,000, but that this offer was rejected by LDM as inadequate. The "Debtor's Disclosure Statement supporting Plan Dated September 2, 1997" indicates that the property is

owned by LDM and encumbered by a $35,000 contract for deed. Exhibit C of the same document assigns a $35,000 gross liquidation value to the property. Irrespective of these representations, it appears the only property interest still held by LDM is a possible recovery from this lawsuit.

(5) Pl.'s Mem. in Op. to Defs.' Mot. for Summ. J., at 9, argues against summary judgment on the negligent misrepresentation claim but fails to advance additional arguments in support of the intentional misrepresentation claim.