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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2210

Brian Sletten,
Appellant,

vs.

Crop Production Services, Inc.
d/b/a United Agri Products,
Respondent.

Filed June 3, 2013
Affirmed in part, reversed in part, and remanded
Chutich, Judge

Sherburne County District Court
File No. 71-CV-11-202

Michelle Dye Neumann, Brian T. Rochel, Halunen & Associates, Minneapolis, Minnesota (for appellant)

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Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

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

CHUTICH, Judge

This appeal follows a jury trial of appellant Brian Sletten's promissory-estoppel claim arising out of respondent's alleged promise to give him a raise. Sletten contends

that the district court erred by dismissing his claims for fraudulent inducement and tortious interference with business expectancy, and by denying his motions to add claims for punitive damages, negligent misrepresentation, and unjust enrichment. We affirm the district court's denial of Sletten's motions to add claims for punitive damages, negligent misrepresentation, and unjust enrichment. Because genuine issues of material fact preclude summary judgment on Sletten's fraudulent inducement and tortious interference with business-expectancy claims, we reverse and remand for further proceedings.

FACTS

Sletten began working at respondent Crop Production Services, Inc. (CPS) in April 2007, as an at-will employee.[1] Sletten worked as an operations manager and earned approximately $52,000 per year.

On or about March 5, 2010, Harlan Lee Fischer, co-president of Manor Concrete (Manor), spoke with Sletten about a job possibility at Manor. Fischer told Sletten that he had to accept or reject the job offer by the following week. Although Fischer and Sletten did not discuss the specific salary and hours of the position, Sletten estimated that he would earn approximately $80,000 per year. That same day, Sletten returned to CPS and told his supervisor, Bill Walker, about his job offer from Manor. Sletten told him that he would like to continue to work for CPS, but he would need a considerable raise of approximately $13,000 and a new company truck to stay at CPS.

[1] We construe the facts presented to the district court upon summary judgment in the light most favorable to Sletten. *See Bearder v. State*, 806 N.W.2d 766, 770 (Minn. 2011).

Walker contacted his supervisor, division manager Mark Pierson, for approval of Sletten's requested raise. Pierson, in turn, contacted his supervisor, regional manager Dean Albrecht, for approval. Albrecht told Pierson that he approved of the raise, and Pierson then informed Walker of the approval.

On March 9, Walker told Sletten that his raise had been approved. Sletten immediately met with Fischer and declined Manor's job offer. The day after Sletten rejected the job offer, he met Pierson at a CPS meeting and thanked Pierson for the raise. Pierson told Sletten that he would see the increase in his next paycheck.

Approximately one week later, Pierson and Albrecht completed an "employee change authorization" form to increase Sletten's salary. A human-resources representative contacted Pierson, informing him that Albrecht did not have the authority to grant Sletten's requested raise. Under CPS policy, any raise greater than 8% had to be approved by Albrecht's supervisor, Thomas Warner. A CPS memorandum, dated January 15, 2010, informed regional and division managers, including Albrecht and Pierson, about this policy. Sletten had requested a 25% raise, but Albrecht and Pierson never sought Warner's approval. The human-resources representative informed Pierson that additional steps were needed to approve Sletten's raise under the policy. Pierson responded that he was not going to complete the necessary steps because he had "hired a seasonal employee . . . that we are planning to put into [Sletten's] spot post spring."

Charles Perry was the seasonal employee to whom Pierson was referring. During the same period of time that Walker and Pierson were discussing Sletten's raise, they were also planning to hire Perry as Sletten's replacement. They planned to have Perry

become the operations manager and replace Sletten after the spring season, which was CPS's busiest time of the year. On March 22, Perry began work at CPS and Walker informed him that Sletten would be leaving CPS in the near future and that Perry would become the operations manager.

Warner ultimately did not approve Sletten's requested raise. In a letter dated March 25, Walker informed Sletten that his raise had not been approved and offered Sletten a stay bonus of $13,000 if he agreed to stay until mid-June, which Sletten declined.[2] In mid-May, Walker fired Sletten for insubordination.

In February 2011, Sletten filed a complaint against CPS, Walker, and Pierson, alleging fraudulent inducement, tortious interference with prospective contract, tortious interference with a business expectancy, and promissory estoppel. Pierson and Walker were subsequently dismissed as individual plaintiffs.

In August 2011, CPS filed a motion for summary judgment and Sletten filed a motion for leave to seek punitive damages. The district court denied Sletten's motion to seek punitive damages and granted CPS's motion for summary judgment on all of Sletten's claims except promissory estoppel. On February 17, 2012, Sletten filed a motion to amend his complaint to add a claim for negligent misrepresentation, which the district court denied.

Sletten tried his promissory-estoppel claim to a jury. At the close of evidence, Sletten renewed his motion to add a claim for negligent misrepresentation and moved to add a claim for unjust enrichment. The district court denied both motions. The jury

[2] The parties dispute whether this proposed bonus was a genuine offer.

found in Sletten's favor on his promissory-estoppel claim and awarded him $2,101.37 in damages. The district court directed entry of judgment, and this appeal followed.

D E C I S I O N

I. Summary Judgment

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010) (quotation omitted).

"We review a decision to grant or deny summary judgment de novo." *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn. 2010). Appellate courts do not resolve issues of fact but only determine whether factual issues exist and whether the district court erred in its application of the law to the facts. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000). In doing so, we construe the facts in the light most favorable to the appealing party and review questions of law de novo. *Bearder*, 806 N.W.2d at 770.

A. Fraudulent Inducement

Sletton first contends that the district court erred when it dismissed his claim for fraud. A claim of fraud requires proof of: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the

representation or made without knowing whether it was true or false; (3) with the intention to induce another person to act in reliance thereon; (4) that the representation caused that person to act in reliance thereon; and (5) that person suffered pecuniary damages as a result of the reliance. *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368 (Minn. 2009).

The primary dispute on appeal is whether a factual issue exists regarding the second element—whether Sletten's superiors told him his raise was approved with knowledge that the statement was false or without knowing whether it was true or false. A person makes a misrepresentation with fraudulent intent if he "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies." *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986) (quotation omitted). "[A] claim to an honest belief that what is false is true is not automatic protection from liability in fraud, if that claim is, under the circumstances, completely improbable." *Id.* at 174.

We conclude that Sletten met his burden at summary judgment on this issue. Albrecht, Pierson, and Walker all testified at their depositions that they believed the process they had completed had been sufficient for the approval of the raise. But the CPS memo regarding raises was sent to Region and Division Managers, including Albrecht and Pierson. Viewing this evidence in the light most favorable to Sletten, Albrecht and Pierson received a memo saying that raises over 8% needed to be approved by upper management, but then proceeded to tell Sletten that his 25% raise was approved without

following the correct procedure. Whether this was done knowingly or without knowledge of whether the policy had been followed is a genuine issue of material fact that should be determined by a jury.

Sletten also contends that CPS's hiring of Perry demonstrates that CPS knowingly lied to him about the raise. After a human resources employee notified Pierson via e-mail that additional steps were needed to approve Sletten's raise, Pierson responded that he was not going to complete a performance review because he had "hired a seasonal employee . . . that we are planning to put into [Sletten's] spot post spring."[3] Although this e-mail was sent after Walker told Sletten his raise was approved, the e-mails together demonstrate that Pierson had no intention of completing the steps necessary to finalize it. While Pierson's e-mail does not prove that he and Walker intentionally lied to Sletten when CPS initially offered him the raise, it provides additional evidence for a jury to consider when determining the circumstances underlying the promised raise and whether CPS knowingly misled Sletten.

CPS counters that Pierson and Walker intended to give Sletten a raise and therefore their statements should be viewed as a promise of a future event. "It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000). Thus, where a fraud claim rests on a representation or promise regarding a future event, the

[3] CPS claims that there was little to no evidence before the district court at summary judgment about Perry's hiring, but Sletten attached a copy of Perry's deposition to his affidavit opposing CPS's motion for summary judgment. *See* Minn. R. Civ. P. 56.03.

plaintiff must affirmatively establish that "the party making the representation had no intention of performing when the promise was made." *Id.* Because Pierson and Walker intended to give Sletten a raise, CPS contends that Sletten cannot base a fraud claim on their statements.

We find this argument unpersuasive. Pierson's and Walker's statements clearly related to a past event, that Sletten's raise *had been* approved, not that it was going to be approved. *See Gorham v. Benson Optical*, 539 N.W.2d 798, 802 (Minn. App. 1995) ("[Plaintiff's] fraud claim requires that [defendant], at the time of the statement, misrepresented a past or present fact, not a future, unpredictable event." (quotation omitted)). Thus, Pierson and Walker made representations to Sletten about an event that had already occurred, not something that they hoped would occur in the future.

Sletten met his burden at summary judgment of demonstrating a genuine issue of material fact about whether CPS personnel informed him that his raise had been approved knowing that they had not followed proper policy or without knowing whether their statement regarding the approval was true or false under the policy. Thus, the district court erred in granting summary judgment on Sletten's fraudulent inducement claim.

B. Tortious Interference with Prospective Contract

In addition, Sletten argues that the district court erred by granting summary judgment on his claim for tortious interference with prospective contract. To establish such a claim, a plaintiff must prove:

> 1. the existence of a reasonable expectation of economic advantage or benefit belonging to Plaintiff;

> 2. that Defendants had knowledge of that expectation of economic advantage;
> 3. that Defendants wrongfully and without justification interfered with Plaintiff's reasonable expectation of economic advantage or benefit;
> 4. that in the absence of the wrongful act of Defendants, it is reasonably probable that Plaintiff would have realized his economic advantage or benefit; and
> 5. that Plaintiff sustained damages as a result of this activity.

Harbor Broad., Inc. v. Boundary Waters Broad., Inc., 636 N.W.2d 560, 569 (Minn. App. 2001).

In granting summary judgment, the district court focused on the third element, concluding that although Walker and Pierson "did not have the authority to grant the raise, this was not improper or wrongful interference because there is no evidence that [they] intentionally lied to [Sletten]." As discussed above, however, Sletten has sustained his burden at summary judgment of creating a genuine issue of material fact as to whether Walker and Pierson knowingly lied to him about the approval of his raise or acted recklessly in misleading him about the raise.

CPS contends that if offering Sletten a raise was actionable, "every offer of better pay . . . would constitute an actionable tortious interference with the employee's employment relationship with someone." *See Cenveo Corp. v. Southern Graphic Sys. Inc.*, 784 F. Supp. 2d 1130, 1139–40 (D. Minn. 2001) (stating that Minnesota courts have not recognized tortious interference "where [the] third-party competitor simply made [a] better offer and [the] employee terminated at-will employment") (alternation in original). This argument is unavailing. An actionable claim for tortious interference requires a

wrongful act, and therefore, only fraudulent offers and promises of increased pay would be actionable.

Because a genuine issue of material fact exists as to whether Walker and Pierson knowingly or recklessly misled Sletten to prevent him from accepting the job at Manor, the district court erred by granting summary judgment on Sletten's tortious interference claim.[4]

II. Punitive Damages

Sletton next asserts that the district court erred by denying his motion to add a claim for punitive damages. Such a motion is properly granted "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1 (2012); *see also Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. App. 2007), *aff'd*, 742 N.W.2d 660 (Minn. 2007). "Punitive damages are an extraordinary remedy to be allowed with caution and within narrow limits." *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. App. 2009). We "may not reverse a district court's denial of a motion to add a claim for punitive damages absent an abuse of discretion." *Id*. (quotation omitted).

A defendant acts with deliberate disregard for the rights or safety of others if he:

> has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

[4] Sletten additionally argues that the district court erred by not separately addressing his claim for tortious interference with business expectancy. This court recently determined that such a claim is identical to a tortious interference with prospective contract claim. *See Gieseke v. IDCA, Inc.*, 826 N.W.2d 816, 825, (Minn. App. 2013), *review granted* (Minn. Apr. 16, 2013).

> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b). Negligence is insufficient to satisfy the deliberate-indifference standard required for punitive damages. *See Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 268 (Minn. 1992) (stating that to properly demonstrate an entitlement to allege punitive damages, "[a] mere showing of negligence is not sufficient").

The district court concluded that Sletten failed to establish a prima facie case that respondents acted with deliberate disregard or willful indifference. While Sletten's evidence is sufficient to create a fact issue as to whether Walker and Pierson deliberately or recklessly failed to follow CPS policy, it does meet the clear and convincing threshold necessary to support a claim for punitive damages. We conclude that the district court did not abuse its broad discretion by denying Sletten's motion to add a punitive-damages claim.

III. Pretrial Motion to Add Negligent Misrepresentation Claim

Sletton also challenges the district court's denial of his pretrial motion to add a claim for negligent misrepresentation. A party may amend its pleadings by leave of the court, which is to be freely granted when justice requires. Minn. R. Civ. P. 15.01. But a party must act with due diligence in attempting to amend its complaint. *Meyer v. Best W. Seville Plaza Hotel*, 562 N.W.2d 690, 694 (Minn. App. 1997), *review denied* (Minn. June 26, 1997). A proposed amendment may be denied if the party fails to show good cause

for not including it in the original complaint. *Hempel v. Creek House Trust*, 743 N.W.2d 305, 313 (Minn. App. 2007). The district court has broad discretion to grant or to deny leave to amend a complaint, and absent a clear abuse of discretion, we will not reverse its ruling. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

One year after filing his complaint, four months after CPS filed its motion for summary judgment, and one month before the scheduled trial date, Sletten moved to add a claim for negligent misrepresentation. The district court denied Sletten's motion to amend because it concluded that Sletten failed to demonstrate good cause or otherwise provide "any explanation on why he did not include a claim of negligent misrepresentation" in his original complaint. Sletten provides no explanation or argument to rebut this reasoning. Thus, we conclude that the district court acted within its discretion in denying Sletten's tardy motion to add a claim for negligent misrepresentation.[5] *See Hempel*, 743 N.W.2d at 313.

IV. Motion to Amend at Trial

At trial, after each side rested, Sletten renewed his motion to add a claim for negligent misrepresentation and also moved to add a claim for unjust enrichment based on the facts presented at trial. The district court denied Sletten's motion and Sletton now challenges that denial.

[5] The district court also concluded that Sletten's negligent-misrepresentation claim was not viable because Walker owed no duty to Sletten, an at-will employee. Because we affirm the district court's ruling based on the lack of good cause, we find it unnecessary to address the district court's alternate grounds for denying Sletten's motion.

Minnesota Rule of Civil Procedure 15.02 governs amendment of pleadings to conform to the evidence and states in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of a trial of these issues.

Litigation by consent is implied where the issues sought to be raised are reasonably apparent and "the intent to try [those] issues is clearly indicated by the failure to object or otherwise." *Hopper v. Rech*, 375 N.W.2d 538, 542 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Dec. 30, 1985). A "[m]ere reference" at trial to the relief sought is not enough, however, to be considered litigation of the issue; rather, "[a] party must have notice of a claim against her and an opportunity to oppose it." *Hofer v. Hofer*, 386 N.W.2d 391, 393 (Minn. App. 1986).

We review a district court's denial of a motion to amend under rule 15.02 for an abuse of discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahmson, Inc.*, 715 N.W.2d 458, 474 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

A. Negligent Misrepresentation

Sletten claims that "[t]he evidence at trial proved a claim for negligent misrepresentation and CPS was on notice of Sletten's proposed claim." Sletten cites no evidence in the trial record in support of this claim, and accordingly has waived this argument. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997)

(stating that an assignment of error based on "mere assertion" and not supported by argument or authority is waived "unless prejudicial error is obvious on mere inspection").

B. Unjust Enrichment

To prove a claim of unjust enrichment, the plaintiff must show that another party knowingly received something of value to which he was not entitled and that it would be unjust for that other party to retain the benefit. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996). "An unjust enrichment claim does not lie merely because one party benefits from another's efforts or obligations; rather it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully." *Custom Design Studio v. Chloe, Inc.*, 584 N.W.2d 430, 433 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Nov. 24, 1998).

Sletten argues that evidence at trial demonstrated that CPS "lied to Mr. Sletten in order to retain him or provide him with information that they knew or should have known was false in order to retain him in order to receive the benefits of his position as the Operations Manager at the Big Lake location by which they were unjustly enriched according to the testimony [of] the amount of 10 million dollars." Sletten provides no evidentiary support for his claim that CPS's profit was the unjust result of Walker's statement that Sletten had been granted the raise. CPS continued to pay Sletten his regular salary and offered him a stay-on bonus to continue to work for CPS during the busy season. A passing reference to CPS's profits during the busy season is insufficient to demonstrate that an unjust enrichment claim was tried by consent. *See Hofer*, 386 N.W.2d at 393.

Thus, the district court did not abuse its discretion in denying Sletten's post-trial motion to add claims for negligent misrepresentation and unjust enrichment. Based on the above, we remand for further proceedings, consistent with this decision, on Sletten's claims for fraud and tortious interference with prospective contract.

Affirmed in part, reversed in part, and remanded.