STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0139

Amasia Acoustics, LLC,
Appellant,

vs.

GN Hearing Care Corporation,
Respondent.

Filed December 9, 2008
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-06-21959

Boris Parker, Nicholas M. Wenner, Parker & Wenner, P.A., 220 South Sixth Street, Suite 1700, Minneapolis, MN 55402 (for appellant)

Joseph M. Sokolowski, Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402-1425; and

Terrence P. Canade (pro hac vice), Locke Lord Bissell & Liddell, LLP, 111 South Wacker Drive, Chicago, IL 60606-4410 (for respondent)

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

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

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

BJORKMAN, Judge

Appellant Amasia Acoustics, LLC challenges the rule 12 dismissal of its joint-venture and breach-of-covenant claims and the summary judgment dismissing its breach-of-contract and promissory-estoppel claims. We affirm.

FACTS

Respondent GN Hearing Care Corporation manufactures hearing aids. Before the business relationship underlying this appeal began, respondent performed its own repair work, including repairs to both its active product lines—hearing aids available in its catalog—and its legacy product lines—hearing aids no longer available for sale. Respondent had an informal policy of repairing its legacy products for as long as it was able to do so, based on marketing and supply factors. The time frame for repairing legacy products varied from product to product, but usually continued for approximately five years.

In 2002, two of respondent's former employees formed appellant Amasia Acoustics, LLC to perform repairs for respondent. In order to ensure the quality of the repair work, respondent agreed to supply appellant with equipment, inventory, and testing systems, essentially making appellant's facility a mirror image of one of respondent's repair facilities. The parties agreed respondent would compensate appellant on a per-unit basis. Appellant sent regular invoices that respondent paid. The parties did not reduce their agreement to writing. Over the next three years, respondent added product lines and increased the volume of repairs appellant was performing. Under this business

arrangement, appellant had no debt, used contract labor instead of employees, and leased its facility on a month-to-month basis.

In September 2005, respondent acquired Interton, another hearing-aid manufacturer. Around the same time, respondent found that its growth had slowed and that it had excess production capacity. Respondent began using its excess capacity to perform repair work. By the end of February 2006, respondent decided to terminate its business relationship with appellant and advised appellant that it would not receive additional units to repair after April 2006. But by early April, respondent proposed to continue working with appellant. The parties were unable to reach an agreement, and in May, appellant communicated its claim for future lost profits through 2011 in the amount of $5.3 million.

Appellant commenced this action in November 2006, asserting breach of contract, misrepresentation, unjust enrichment, breach of the covenant of good faith and fair dealing, and three joint-venture claims. Appellant subsequently amended the complaint to add a claim of promissory estoppel. Appellant's claims are premised on the allegation that the parties had entered into a five-year contract. Respondent moved to dismiss all of the claims under Minn. R. Civ. P. 12.02(e), arguing principally that the statute of frauds precluded the contract claims and that the parties were not joint venturers. The district court dismissed the three joint-venture claims and the breach-of-covenant claim, finding

that appellant had failed to allege any facts showing respondent had acted in bad faith or hindered appellant's ability to perform.[1]

The case proceeded on appellant's two remaining claims—breach of contract and promissory estoppel. As part of discovery, appellant sought access to respondent's computer backup tapes containing e-mails. The district court ordered respondent to produce the tapes and appellant to hire an independent consultant to analyze them.

In September 2007, respondent moved for summary judgment on both claims. Appellant opposed the motion and asked the district court to stay the motion on the ground that discovery was not complete. Appellant admitted that respondent had complied with the discovery order but argued that appellant's experts could not access the tapes and that additional cooperation from respondent was needed.

The district court granted summary judgment dismissing the remaining claims. The district court found that the writings appellant relied on did not sufficiently refer to one another to establish the alleged duration of the parties' agreement. The district court also found that appellant could not establish any of the elements of promissory estoppel. By ruling on the motion, the district court implicitly denied the stay request. This appeal follows.

[1] The district court also dismissed the misrepresentation and unjust-enrichment claims, but appellant does not challenge the dismissal of these claims.

D E C I S I O N

I.

Appellant first argues the district court erred in dismissing its joint-venture claims under Minn. R. Civ. P. 12.02(e). In reviewing cases dismissed for failure to state a claim on which relief can be granted, the only question before us is "whether the complaint sets forth a legally sufficient claim for relief." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). A pleading should be dismissed "only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). We review this question de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

A joint venture exists if four elements are present: (1) contribution by the parties of their resources to a common undertaking, (2) joint control over the enterprise, (3) profit sharing, and (4) an express or implied contract showing the existence of a joint venture. *Rehnberg v. Minn. Homes, Inc.*, 236 Minn. 230, 235–36, 52 N.W.2d 454, 457 (1952).

The district court held that appellant had failed to establish the contribution, joint-control, and profit-sharing elements. We agree that the facts appellant alleges in the complaint are inconsistent with two of the elements: joint control and profit sharing.[2]

[2] We do not suggest that the district court was wrong in its contribution analysis. The negation by a claimant of even a single element is enough to grant a motion to dismiss. The complaint here most clearly undercuts the joint-control and profit-sharing elements.

Joint control exists when each party may direct or control how the other party runs its business. *Powell v. Trans Global Tours, Inc.*, 594 N.W.2d 252, 256 (Minn. App. 1999). If one party lacks control or decision-making power beyond its own business, there is no joint control and thus no joint venture. *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 417 (Minn. App. 2008). Here, the complaint alleges that appellant agreed to perform repair work according to respondent's quality standards and volume demands. There are no allegations or evidence suggesting that appellant could control how respondent ran its business. In short, appellant performed services for respondent on respondent's terms. The joint-control element is not present.

There is no profit sharing, for joint-venture purposes, "[i]f the amount that one party receives is fixed, regardless of the success or failure of the enterprise." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 390 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). Here, the complaint clearly shows that respondent compensated appellant for its work on a fixed, per-unit basis. Appellant does not allege that either party had any right to the other's profits. While both parties may have found this business arrangement profitable, they did not share in each other's profits.

The Amasia–GN relationship was a traditional fee-for-services arrangement. Because this relationship, as set forth in the complaint, was not one of joint venturers, the district court did not err in dismissing the joint-venture claims.[3]

[3] In the absence of a joint-venture relationship, parties deal with each other at arm's length and owe each other no special duties. *Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N.W.2d 86, 91 (1953). Thus, when the court dismissed the joint-venture claims, the fiduciary-duty claim necessarily failed.

II.

Appellant next argues the district court erred in granting summary judgment on the breach-of-contract and promissory-estoppel claims. These arguments fail because ultimately there is no record evidence of any agreement—written or otherwise—as to the duration of the parties' business relationship.[4]

On an appeal from summary judgment, we consider whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). There is no genuine issue of material fact when the record as a whole could not lead a rational fact-finder to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

A. The breach-of-contract claim

Under the statute of frauds, an "agreement that by its terms is not to be performed within one year" cannot be the basis for a claim "unless [the] agreement, or some note or memorandum thereof, . . . is in writing, and subscribed by the party charged therewith." Minn. Stat. § 513.01 (2006). "The statute expresses a public policy of preventing the enforcement . . . of contracts that were never in fact made." *Radke v. Brenon*, 271 Minn. 35, 38, 134 N.W.2d 887, 890 (1965). The memorandum must set forth all of the material or essential terms of the agreement. *Taylor v. Allen*, 40 Minn. 433, 434, 42 N.W. 292,

[4] Appellant concedes in its reply brief that "duration was never clearly defined or fixed" as part of the asserted contract.

292 (1889). Multiple documents, read together, may satisfy the statute of frauds, as long as the documents are obviously connected to each other. *Union Hay Co. v. Des Moines Flour & Feed Co.*, 159 Minn. 106, 109, 198 N.W. 312, 313 (1924).

Appellant concedes that there is no writing regarding the duration of the parties' agreement, but argues that respondent's internal repair and production policies and the invoices between the parties may be read together to satisfy the statute of frauds. We disagree. The documents appellant cites do not refer to each other and are not obviously connected. The invoices only establish that appellant performed work for respondent; they are silent as to any long-term agreement for continued work. Respondent's internal repair policies suggest that respondent will continue to repair hearing aids for the first five years after production ends. But nothing in these policies indicates respondent would outsource this legacy repair work, much less outsource it to appellant. And the document that respondent labeled an implementation plan, which appellant asserts was related to the increased volume of repairs that the parties anticipated appellant would begin performing in late 2005, is unsubscribed and does not memorialize a long-term, five-year agreement.

Appellant attempts to take the agreement outside the statute of frauds on two grounds: (1) the agreement could have been performed within one year, and (2) this court should recognize and apply a "judicial admissions" exception to the statute. We find both arguments unavailing. First, if the agreement has no specific duration and could have been performed within one year, appellant's very theory of contract breach fails outright. If the contract could have been performed in one year, then appellant is not

entitled to receive the five years in future lost profits it seeks as damages. Moreover, appellant did not present this argument to the district court, and we generally limit our consideration to theories and issues presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Second, the judicial-admissions argument is premised on the theory that it would be contrary to the policy of contract law to permit a party to escape an agreement it made, and admits, in the context of litigation, to making, merely because the agreement was not memorialized. Our supreme court has not recognized this exception to the statute of frauds, and it is not our role to do so. *See Orthomet, Inc. v. A.B. Med., Inc.*, 990 F.2d 387, 391 (8th Cir. 1993) (reviewing Minnesota law); *Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that we are "an error correcting court . . . without authority to change the law"), *review denied* (Minn. June 17, 1998). And even if there were factual scenarios on which to adopt this exception, they are not the facts before us. During their depositions, respondent's employees expressly disclaimed any five-year agreement and said their employer never would have made a long-term agreement. Thus, the predicate admissions are absent here.

The district court did not err by granting summary judgment on appellant's contract claim based on the statute of frauds.

B. The promissory-estoppel claim

Promissory estoppel is an equitable doctrine that implies a contract where none exists. *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995). Its

elements are set forth in three questions: (1) Was there a clear and definite promise? (2) Did the promisor intend to induce reliance, and did the promisee rely to its detriment? (3) Must the promise be enforced to prevent injustice? *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000). The failure to establish any one element is sufficient to support summary judgment against the party claiming promissory estoppel. *Ruud*, 526 N.W.2d at 372.

Appellant claims respondent promised to continue sending its legacy hearing aids to appellant to repair for five years after respondent stopped manufacturing them. However, despite extensive discovery, appellant is unable to establish a genuine issue of material fact as to this alleged promise. Nothing in respondent's internal policies, in any statements by respondent to appellant, or in any deposition testimony indicates that respondent ever promised to use appellant's services on a five-year basis. No rational fact-finder could find that respondent made a clear and definite promise to appellant along those lines.

Even if appellant were able to prove that respondent made such a promise, appellant cannot prove detrimental reliance. Appellant argues that it relied on the promise by expanding its repair facilities, employing more workers, and acquiring equipment, and that respondent intended this reliance because it understood that these steps were necessary. Even assuming respondent intended such reliance, appellant has not demonstrated that it relied on any promises to its detriment. The undisputed evidence, including admissions by appellant's principals, demonstrates that appellant did not incur debt, held only month-to-month leases on its facilities, and used contract

laborers. Respondent supplied the equipment appellant needed to perform the work. The material facts are undisputed and do not demonstrate detrimental reliance. The district court did not err in granting summary judgment on the promissory-estoppel claim.

III.

"[E]very contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (quotation omitted).

Here, the complaint set forth two distinct theories of the parties' business relationship—a joint-venture theory and a traditional services-contract theory. The complaint does not specify to which theory the breach-of-covenant claim applies. If the breach-of-covenant claim is interpreted as applying to the joint-venture theory, then the breach-of-covenant claim failed along with the joint-venture claims. On the other hand, if the breach-of-covenant claim applies to the services-contract claim, then dismissal was premature. The allegations of the complaint leave open the possibility that respondent acted in bad faith. Nothing appellant included in the pleading is inconsistent with bad faith. Since the breach-of-contract claim survived the motion to dismiss, the breach-of-covenant claim should have survived with it.

However, when it is clear a claim would properly have been disposed of by summary judgment, its premature dismissal under rule 12 is harmless error. *Kellar v. VonHoltum*, 568 N.W.2d 186, 190 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). The district court properly dismissed the breach-of-contract claim on summary

judgment. Accordingly, the breach-of-covenant claim would also have been resolved against appellant. Any error in its early resolution was harmless.

IV.

Finally, appellant argues the district court abused its discretion by effectively denying appellant's request to stay ruling on the summary-judgment motion. A district court may deny a motion for summary judgment or continue the hearing to permit additional discovery if it appears that a party opposing the motion cannot present facts essential to justify its opposition. Minn. R. Civ. P. 56.06. We review the district court's refusal to grant a continuance for an abuse of discretion. *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). Because there is a presumption in favor of such continuances, "a reviewing court focuses on two questions: (1) has plaintiff been diligent in seeking or obtaining discovery and (2) is plaintiff seeking further discovery in the good-faith belief that material facts will be uncovered, or is plaintiff merely engaging in a fishing expedition?" *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 14, 2005).

This case does not present a situation where a party was unable to obtain information necessary to respond to a rule 56 motion; appellant had obtained the documents it requested from respondent. What appellant had apparently not done was act diligently to ascertain the contents of the backup tapes. Nor is this a case where a party is unable to state facts to justify its opposition to summary judgment. Appellant argued against summary judgment and filed affidavits, including one that had over 40 multi-page

exhibits. The district court did not abuse its discretion by denying appellant's continuance request and ordering summary judgment in favor of respondent.

Affirmed.