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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2290

Steven Ehlen,
Appellant,

vs.

Hanratty & Associates, Inc.,
Respondent.

Filed October 13, 2009
Affirmed
Ross, Judge

Stearns County District Court
File No. 73-CV-07-9565

Mark A. Olson, Olson Law Office, 2605 East Cliff Road, Suite 100, Burnsville, MN 55337 (for appellant)

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Muehlberg, 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

ROSS, Judge

This appeal arises from a dispute over insurance sales proceeds, which an ousted sales representative seeks as commissions earned and which the insurance agency from which he departed claims to be beyond the scope of the parties' commission agreement. Steven Ehlen, a former Hanratty & Associates commissioned salesman, sued Hanratty for commissions that Ehlen contends he earned before the agency terminated the relationship. Ehlen brought claims for breach of contract, penalty damages under Minnesota Statutes section 181.145, quantum meruit, and unjust enrichment. The district court granted summary judgment in favor of Hanratty, concluding that (1) "there was no contract regarding payment of commissions after the termination of the parties' relationship"; (2) Ehlen had not "earned" his commissions before he was terminated, so he was not entitled to relief under section 181.145; and (3) Ehlen's equitable claims failed as a matter of law. It also ordered Ehlen to pay Hanratty $3,743.01 for costs. Ehlen appeals both decisions.

Because Ehlen failed to establish that the parties had an agreement regarding post-termination commission payments, we affirm the district court's summary judgment decision regarding his contract claim. Because Ehlen had not earned the commissions before he was terminated, he is not entitled to damages under section 181.145. We also conclude that the district court properly dismissed Ehlen's equitable claims because Ehlen failed to show that Hanratty was unjustly enriched by retaining the commissions.

Finally, because Ehlen failed to contest the taxation of costs at the district court, he is not entitled to relief on appeal.

FACTS

Hanratty & Associates is an insurance agency that designs and sells health insurance and employee benefit plans. From August 1997 until March 9, 2004, Steven Ehlen worked for Hanratty as an independent contractor. Under the Hanratty–Ehlen arrangement, Ehlen sold health insurance and employee benefit plans to employers and split commissions with Hanratty for the policies that he sold. The plans related to this dispute have a one-year policy period, with commissions split monthly. The insured pays its monthly premium to the insurance carrier, which in turn sends a commission to the policy's "agent of record." After Hanratty received monthly commission payments from the insurance companies, it would divide the commission with Ehlen based on a predetermined commission-splitting formula. For some accounts, Hanratty and Ehlen split the commission evenly. For other accounts, Hanratty received 60 percent and Ehlen 40 percent. But if the insured did not pay its monthly premium, the insurance carrier would cancel the policy and forward no commission payment and neither Ehlen nor Hanratty received a commission.

On March 2, 2004, Hanratty learned that Ehlen intended to sever his relationship with Hanratty and work with a new agency, effective May 1. Hanratty rejected Ehlen's offer to continue their relationship until May, and on March 9, sent a letter to Ehlen terminating their business relationship, effective immediately. Between March 2 and March 9, Ehlen and Timothy Hanratty had several telephone conversations about their business relationship. Ehlen secretly recorded many of the conversations and introduced them at the district court to support his claims.

After Hanratty terminated the relationship, a dispute arose regarding commissions. Ehlen claimed that Hanratty owed him "commissions and fees on contracts that Ehlen had sold at the time of [Ehlen's] termination." The parties had no written agreement concerning commission distribution in the event that Ehlen's independent consultancy with Hanratty ended.

The district court granted summary judgment and awarded costs in favor of Hanratty. Ehlen appeals.

D E C I S I O N

On appeal from summary judgment, this court determines whether genuine issues of material fact exist 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 view evidence in the light most favorable to the party resisting summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). And we will affirm a district court's grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I

We first address Ehlen's breach of contract claim. Ehlen argues that the district court applied the wrong summary judgment standard and that it erred by concluding that no agreement covered post-termination commission division. Ehlen asserts that he presented sufficient evidence of an oral or implied agreement entitling him to commissions on policies that he sold while working for Hanratty even when the commissions were received by Hanratty after Ehlen left the agency. On appeal, Ehlen argues for the first time that the "procuring cause doctrine" controls and provides that "a commissioned salesman does not forfeit the right to a commission already earned by terminating his employment *unless* the parties' contract specifically says otherwise."

Ehlen's complaint claimed breach of contract based on "Hanratty's refusal to pay Ehlen commissions and fees that had been agreed upon and earned by Ehlen." To establish that a contract existed, Ehlen needed to prove a valid offer, acceptance, and consideration. *See Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008). The formation of a contract depends on the parties' objective conduct. *Id.* A contract requires agreement "with reasonable certainty about the same thing and on the same terms." *Peters v. Mut. Benefit Life Ins. Co.,* 420 N.W.2d 908, 914 (Minn. App. 1988). There must be a "meeting of the minds concerning [the alleged agreement's] essential elements." *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980). Issues of contract formation are generally fact questions for the jury, but judgment as a matter of law is appropriate when there is no dispute over relevant facts. *Estate of Peterson*, 579 N.W.2d 488, 490 (Minn. App. 1998), *review denied* (Minn. Aug. 18, 1998).

The district court determined that "there was no contract regarding payment of commissions after the termination of the parties' relationship." It gave three reasons for its finding: (1) there was no written employment contract or policy addressing whether commissions are payable after termination, (2) commission reports did not address whether commissions are payable after termination, and (3) Ehlen's affidavit acknowledged that he lacked an oral agreement entitling him to post-termination commissions. The district court's decision is supported by the record.

No written contract memorialized the parties' arrangement. Since Ehlen began working for Hanratty in 1997, the parties divided monthly commissions on the policies that Ehlen sold or serviced. They now agree on the amount of the relative share of the commissions and that the commissions were divided monthly after Hanratty received them from the insurance carriers. The parties also agree that the commissions were divided consistently from 1997 until March 2004, when the parties' relationship ended. The parties' unvaried practice proved that they had an unwritten agreement to divide the commissions received from insurance carriers during the time that Ehlen worked for Hanratty.

But the parties never discussed if or how commissions would be shared after their relationship terminated. Ehlen's own deposition testimony establishes this. Ehlen's testimony first described his commission splits with Hanratty, and then he answered whether there "were . . . ever any terms discussed about what would happen if [he] left Hanratty" by responding, "No, because originally I was planning on buying Tim Hanratty out." Later in his deposition, Ehlen claimed that a "verbal contract" with Hanratty covered how commissions would be divided on termination. Hanratty's attorney inquired about this apparent contradiction, "I believe when we said earlier you didn't have a term of a contract pertaining to what happened if you left the agency." Ehlen replied, "Other than our verbal agreement which is in the recordings, [no].” When Hanratty’s attorney probed further, Ehlen clarified that no verbal agreement actually occurred:

> Q: So if I’m understanding what you are saying, you are saying that there’s a contract between you and Mr. Hanratty based on the verbal recordings?
>
> A: Well, and verbally what he and I had discussed previously and my commission splits.
>
> Q: What did you discuss previously?
>
> A: That he would continue to pay me on groups that I sold, number one. Number two, that he would not actively solicit any of my groups, which he did.
>
> Q: And when did you and Mr. Hanratty form—or have this discussion?
>
> A: That discussion was on or about March 15th I’ll say, 14th, right around there of 2004.
>
> Q: That was the *first time you discussed that issue*?
>
> A: That’s the *first time that it had to come up* because of the chain of events that occurred with the termination.
>
> . . . .
>
> Q: Okay. Other than those conversations that you’ve just talked about that occurred around March 14th of 2004, are there any other conversations that you assert this agreement was reached in?
>
> A: No, because I was not planning on . . . leaving the agency.

Ehlen’s deposition testimony therefore shows that the first time the issue of payment of post-departure commissions came up was *after* he was terminated. And at oral argument on appeal, Ehlen’s attorney conceded that before Ehlen’s termination, “nothing” was discussed regarding post-termination commissions. This defeats his argument that the basis of his claims to the commissions Hanratty received after their relationship ended was an “oral agreement at the commencement of their association.”

The record evidence, taken in the light most favorable to Ehlen, shows that there was no “meeting of the minds” regarding payment of post-termination commissions. Ehlen’s recorded conversations with Hanratty do not address the payment of commissions after Ehlen’s termination. Even if they did, Ehlen acknowledges that the “[p]ost-March 1, 2004 discussions and actions have nothing to do with [Ehlen’s] claim for commissions.” The district court properly concluded that no fact dispute exists concerning whether the parties had agreed to divide commissions after the business relationship ended.

Absence of Contrary Agreement

Ehlen asserts alternatively that he is entitled to the commissions because the parties’ agreement did not contain a provision explicitly disqualifying him from receiving commissions after the termination of their relationship. He argues that the district court misapplied the law because, absent an agreement to the contrary, a commissioned salesperson is entitled to receive commissions on policies he sells even if his employer receives the commissions after the parties’ relationship has ended. He reframes this same argument in another way under the “procuring cause doctrine.” He contends that under that doctrine, he is entitled to commissions earned before the termination “*unless* the parties’ contract specifically says otherwise.” He maintains that “an insurance broker earns a commission when he brings about the relationship of insurer and insured.” But

Ehlen did not raise these arguments before the district court, and we decline to consider this theory raised for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that arguments not raised before the district court are waived).

Reliance on Unpublished Opinions

Ehlen also argues that the district court's summary judgment decision was improper because it relied on the unpublished case of *Friedenfeld v. Winthrop Res. Corp.*, Nos. C5-02-1606, C4-02-1659, 2003 WL 1908112 (Minn. App. Apr. 22, 2003), *review denied* (Minn. June 25, 2003). Although unpublished decisions are not precedential, their reasoning may be referred to for persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). The district court does not appear to have improperly elevated *Friedenfeld*'s influence.

In sum, the undisputed facts show that the commission-generating event under the parties' arrangement here was Hanratty's receipt of monthly payments from the insurance carriers. Hanratty's affidavit explains without factual dispute that, "[g]iven the uncertainty and unpredictability of whether an insured will pay its policy premiums, cancel the policy or change the agent of record, Hanratty only considers commissions earned when it receives payment from the insurer." Hanratty's statement is supported by the history of the parties' relationship because the agency disbursed commission payments monthly after the client paid the premium and the insurance carrier paid Hanratty. Ehlen acknowledged that if the insured does not make its monthly premium payment, the insurance agent does not receive any commission. Contrary to Ehlen's claim on appeal, the undisputed evidence established that commissions were not earned when he sold the policies; rather, they were earned when the insureds paid the monthly premium. Because Ehlen failed to present any evidence to show that he and Hanratty agreed that Hanratty would pay him for commissions realized after his employment ended, the district court properly granted summary judgment in Hanratty's favor.

II

Ehlen next argues that he is entitled to the post-departure commissions that Hanratty received, relying on Minnesota Statutes section 181.145. He contends that the district court erred in its interpretation and application of the statute. "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. May 29, 2001).

Section 181.145 requires employers to pay to independent contractors the commissions that the contractors earned through the last day of employment. If an employer fails to pay the commissions earned after a demand has been made by the salesperson, the statute obliges the employer to pay "in addition to earned commissions" a penalty for each of up to fifteen days the employer was late in paying the salesperson. Minn. Stat. § 181.145, subd. 3 (2008).

The issue here is whether the commissions that Ehlen claims were actually "earned" prior to the date he was terminated. The statute provides some guidance:

> For the purposes of this section, the phrase "commissions earned through the last day of employment" means commissions due for services or merchandise which have actually been delivered to and accepted by the customer by the final day of the salesperson's employment.

Id., subd. 1 (2008). Applying this definition, the district court concluded that because "the evidence demonstrates that the insurance is not accepted by the customer until the customer pays the monthly premium," and because "the commission generating event in this case is the payment of policy premiums by the insured to the agent of record," Ehlen had not "earned" the commissions within the meaning of the statute. It therefore dismissed Ehlen's claim for penalty damages under section 181.145.

Ehlen points to *Beernink v. Rodwell*, 455 N.W.2d 87 (Minn. App. 1990), to support his argument that he "earned" his commissions when he sold the policies to the insureds. But in *Beernink*, "[t]he only issue on appeal [was] whether 'services or merchandise' under Minn. Stat. § 181.145 (1986) include a contract for life insurance." 455 N.W.2d at 89. The *Beernink* court concluded that they do. *Id.* It commented in dicta that "there was a delivery of the merchandise under the statute when coverage was afforded the insured." *Id.* Ehlen relies on this dicta and argues that there is no real difference between health insurance policies and life insurance policies. He contends that because policies are "delivered" on the date coverage is afforded to the insured, he is entitled to commissions on policies that he sold even though the commissions were received after his termination. His argument faces two significant problems.

First, we agree with the district court that *Beernink* is materially distinct from this case. The *Beernink* court considered a life insurance policy with an unspecified duration and payment period. The opinion states only that the policy "was issued September 1, 1987" and "produced a commission of $9,257.16." 455 N.W.2d at 88. It appears that this was a one-time commission payment from the life insurance carrier to the agency that sold the policy. By contrast, here the selling agency receives monthly commissions from the insurance company only if the insured makes payments on its policy. Unlike *Beernink*, where the full commission was earned when the policy was sold and delivered, the commissions here were contingent on continued monthly premium payments. The continuation of these payments could not be known within fifteen days of Ehlen's termination.

Second, under the definition of "commissions earned through the last day of employment," the merchandise must have been "accepted by the customer." It is undisputed that at the time Ehlen was terminated, the parties did not know if the customers would continually accept the policies Ehlen sold them. Ehlen testified that if the insured makes no premium payment, the agency receives no commission. Hanratty's insurance expert's affidavit opines similarly that an agent "earns a commission only when the insured has made a premium payment." It was therefore unclear whether the customers would continue to accept the policies after the date Ehlen was terminated because they could decline to pay the monthly policy premiums at any time during the policies' twelve-month period. Ehlen's argument that all twelve months of potential commissions were actually "earned" before the date he was terminated fails.

We conclude that the district court properly dismissed Ehlen's claim for earnings and penalty damages based on section 181.145. The undisputed facts show that there was no contract governing post-departure commissions, and the commissions Ehlen seeks were not "earned" and could not be calculated before the relationship ended.

III

Ehlen contends that even if his legal arguments fail, he is entitled to the post-departure commissions based on the equitable theories of unjust enrichment and quantum meruit. We disagree.

The district court dismissed Ehlen's claim of unjust enrichment, concluding that there was "nothing illegal or unlawful" about Hanratty's accepting the agent-of-record designation on some of Ehlen's former client groups and receiving commissions from those groups in exchange for servicing and administering their claims after Ehlen was terminated. The district court also dismissed Ehlen's claim for quantum meruit because "quantum meruit . . . does not arise absent a showing of unjust enrichment."

A party is unjustly enriched when it knowingly receives something of value that it was not entitled to under circumstances that make it unjust for the party to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). An unjust enrichment claim is not established merely because one person benefits from another's efforts. *Custom Design Studio v. Chloe, Inc.*, 584 N.W.2d 430, 433 (Minn. App. 1998), *review denied* (Minn. Sept. 29, 1998). Unjust enrichment requires unjust or illegal conduct. *Id*. The evidence shows that the district court properly dismissed Ehlen's claim for unjust enrichment.

It was not unjust or illegal for Hanratty to receive the commissions from the policies that Ehlen sold because Hanratty was the agent of record that serviced and administered claims. If Hanratty had fired Ehlen in bad faith to collect the entire commission on each premium payment, Ehlen's claim for unjust enrichment might have some merit. But Ehlen did not assert that Hanratty terminated him in bad faith, and the facts surrounding his termination show why. Ehlen, not Hanratty, initiated the separation. There is nothing unjust or illegal about Hanratty's collecting commissions from Ehlen's former clients after Hanratty became the agent of record.

Ehlen's claim of quantum meruit was also appropriately dismissed because the doctrine "is used only when failure to do so would result in unjust enrichment." *Stemmer v. Estate of Sarazin*, 362 N.W.2d 406, 408 (Minn. App. 1985). Because Hanratty was not unjustly enriched, Ehlen cannot recover in quantum meruit.

IV

After the district court granted Hanratty's motion for summary judgment, Hanratty sought to tax costs and disbursements, including copying expenses, computerized research charges, deposition expenses, and expert witness fees. The costs and disbursements totaled $3,743.01. Hanratty served notice of costs to Ehlen on September 8, 2008. The district court administrator entered judgment on October 1, 2008. Ehlen argues that the "court administration improperly taxed costs and disbursements that are not allowed by statute." Hanratty argues that Ehlen waived his right to contest costs because he failed to timely object to them.

Rule 54.04 of the Minnesota Rules of Civil Procedure allows costs and disbursements to be taxed by the court administrator on two days' notice, provided that the costs and disbursements are allowed by statute. Minnesota Statutes section 549.04 provides that "[i]n every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred." Minn. Stat. 549.04, subd. 1 (2008).

A district court lacks discretion to deny reasonable costs and disbursements to a prevailing party, but it does have discretion to decide what costs are reasonable. *Quade & Sons Refrigeration, Inc. v. Minn. Min. & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). A district court's award of reasonable costs is therefore reviewed for an abuse of discretion. *Striebel v. Minn. State High Sch. League*, 321 N.W.2d 400, 403 (Minn. 1982).

Ehlen contends that the district court abused its discretion because it did not make findings as to the reasonableness of the costs and disbursements. But Ehlen did not properly object to the taxation of costs or file a notice of appeal with the district court administrator as directed by rule 54.04 of the Minnesota Rules of Civil Procedure. Ehlen's attorney sent a letter one day before the court administrator entered the judgment stating that "we object to the majority of the claims other than the filing fee and costs allowed by statute as being unrecoverable." He did not follow rule 54.04, which provides that "[t]he party objecting to any item [of costs and disbursements] shall specify in writing the ground thereof; a party aggrieved by the action of the court administrator may file a notice of appeal with the court administrator who shall forthwith certify the matter to the court." As the prevailing party at the district court, Hanratty is entitled to an award of reasonable costs and disbursements. And because Ehlen did not properly identify the items that he objected to and failed to file a notice of appeal of the taxation of costs with the district court administrator, the district court was never asked to exercise its discretion. We therefore cannot conclude that it abused its discretion.

Affirmed.