STATE OF MINNESOTA
IN COURT OF APPEALS
A10-834

PEMS Co. International, Inc.,
Appellant,

vs.

Temp-Air, Inc.,
f/k/a Rupp Industries Acquisitions, Inc. and f/k/a Rupp Industries, Inc., et al.,
defendants and third party plaintiffs,
Respondents,

vs.

Robert W. Brooke,
third party defendant,
Respondent.

Filed January 11, 2011
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-09-4174

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, Wayzata, Minnesota (for appellant)

Todd Wind, Patrick D.J. Mahlberg, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondents Temp-Air, Inc. and James A. Korn)

Jan Stuurmans, Law Offices of Jan Stuurmans, P.A., Minneapolis, Minnesota (for respondent Robert W. Brooke)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

ROSS, Judge

At stake here is a $400,000 sales commission that one company expected to be paid after it successfully secured a buyer for the $20 million complete stock sale of Rupp Industries, Inc. Asserting contract and tort theories, PEMS Co. International, Inc., sued Rupp Industries and its principal officer, James Korn, for allegedly reneging on their agreement to pay PEMS the commission. The district court dismissed all claims at summary judgment. We agree with the district court that PEMS was acting as a "broker" in the sale of the business, and, having no broker's license, it is statutorily barred by Minnesota Statutes section 82.85 from maintaining this suit to collect the commission under any of the theories asserted. Assuming PEMS's fraud claim may be treated as something other than a claim to collect the unpaid commission, the claim cannot survive the summary judgment motion because PEMS failed to identify admissible evidence establishing each element of the claim. We therefore affirm.

FACTS

Since this case arrives on appeal from summary judgment, we describe the facts that are either undisputed or construed in PEMS's favor from reasonable inferences.

PEMS owner William Slayton entered into a "handshake agreement" in early 2005 with Rupp Industries executive, Rick Estergren, to find a buyer for Rupp Industries. The deal was that PEMS would serve as the "only outsider" helping Rupp Industries "find a

suitable buyer and facilitate a purchase of the company" and that if PEMS found a buyer, the buyer would pay PEMS two percent of the purchase price.

On that deal, PEMS went to work analyzing Rupp Industries' operational and financial condition, incurred and paid legal fees, carefully managed Rupp Industries' proprietary and other confidential data, and individually screened approximately 15 potential buyers to identify the best suitor. In April 2006, Slayton met with Robert Brooke, a member of an investment group that would become Rupp Industries Acquisition, Inc. (RIA), to discuss the purchase of Rupp Industries. Brooke agreed that PEMS would receive two percent of the sale price as commission for its match-making services. Brooke told Slayton about James Korn, a member of the investment group whom Brooke described as Brooke's attorney and good friend. Slayton interpreted this to mean that Korn would serve only as attorney and nonactive silent partner in the investment group's acquisition of Rupp Industries.

Slayton met with Estergren, Brooke, and Korn in October 2006. Slayton presented a "Consulting Agreement" detailing PEMS's role and the two-percent commission arrangement. No one signed the document, but all shared the common understanding that it encompassed their deal. Slayton then met with Brooke many times.

Using PEMS's services, RIA learned key information useful to deciding whether to purchase Rupp Industries. RIA purchased Rupp Industries in August 2007 for $20 million, and PEMS therefore expected a $400,000 sales commission. At some point shortly before the purchase, Brooke was "involuntarily excluded" from the deal, perhaps

at Korn's behest. RIA soon renamed Rupp Industries to Temp-Air, Inc., with James Korn as a shareholder and its chief executive officer. No one paid PEMS's commission.

PEMS sued Temp-Air under its various names and James Korn for $400,000 on theories of breach of contract, quantum meruit, fraud, unjust enrichment, promissory estoppel, breach of implied covenant of good faith and fair dealing, and intentional interference with prospective economic advantage. Temp-Air and Korn filed a third-party complaint against Robert Brooke. They brought a motion for judgment on the pleadings, which ultimately converted to a summary judgment motion. PEMS withdrew its claim of breach of the implied covenant of good faith and fair dealing.

The district court dismissed the suit. It granted summary judgment to Temp-Air, holding that Minnesota Statutes section 82.85 barred PEMS's suit for compensation for its services because PEMS was not a licensed real estate broker. It granted summary judgment to Korn, holding that PEMS failed to present evidence as to each element of the tort claims. Because it dismissed the claims against Temp-Air and Korn, it dismissed the third-party complaint against Brooke. PEMS appeals.

D E C I S I O N

PEMS challenges the district court's entry of summary judgment against it. Summary judgment is appropriate if the pleadings and admissible evidence demonstrate that no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal, we look at the evidence in the light most favorable to the nonmoving party, and we assess whether genuine issues of

material fact exist and whether the district court properly applied the law. *Pawn Am. Minn., LLC v. City of St. Louis Park*, 787 N.W.2d 565, 570 (Minn. 2010).

PEMS bases its appeal primarily on four arguments. It argues that the nature of the sale, which regarded stock rather than the business itself, renders inapplicable the statute regulating real-estate and business brokering. It next argues in the alternative that the nature of its activities, which it asserts were that of a "finder" rather than of a "broker," removes it from the licensure requirement. PEMS then argues that disputed facts prevent summary judgment dismissing its fraud claim against Korn. And PEMS finally contends that its claim of intentional interference with prospective economic advantage is a recognized tort in Minnesota and that the claim is not subject to section 82.85's bar because it seeks damages other than the payment of commission.

I

PEMS first argues that the district court erred by concluding that the Real Estate Brokers and Salespersons Act, Minnesota Statute chapter 82, governed the sale of Rupp Industries. It maintains that the Minnesota Securities Act, Minn. Stat. chapter 80A, governed the sale because the sale concerned only stock. A challenge to the district court's interpretation of a statute raises a question of law, which we review de novo. *Id.* We first look to whether the statutory language is clear on its face. Minn. Stat. § 645.16 (2010); *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010). If it is clear and free from all ambiguity, we depend on the plain meaning rather than look beyond the words in search of their spirit. *Id*.

The plain language of the statutes leads us to conclude that the Real Estate Brokers and Salespersons Act governed the Rupp Industries sale that PEMS facilitated. Despite the emphasis that some parts of the act put on real estate transactions, the act also addresses the sale of businesses. More specifically as it applies here, the act defines a "'real estate broker' or 'broker'" to include any person who deals with the sale of a business or "any interest therein." Minn. Stat. § 82.55, subd. 19(d) (2010). The sale here was for one-hundred percent of the interest in Rupp Industries. This squarely fits the statutory definition under the Real Estate Brokers and Salespersons Act.

That conclusion ends the inquiry, but we add that the plain language of PEMS's alternative statute, the Minnesota Securities Act, informs us that *that* statute does not apparently apply. PEMS essentially contends that the sale of stock alone rather than the sale of any of the business's real or other property constituted a securities transaction. But the act defines the word "security" specifically to exclude the type of transaction that occurred here—the one-hundred-percent-interest sale of a closely held corporation negotiated on behalf of all purchasers, each with access to inside information about the entity. *See* Minn. Stat. § 80A.41(30)(E) (2010).

It is true that some transactions might constitute both a business sale under chapter 82 and a securities sale under chapter 80. But that possibility does not help PEMS because chapter 82 already accounts for that possibility with a tightly worded exception to the definition of real estate broker, which does not apply to PEMS:

> Unless a person is licensed or otherwise required to be licensed under this chapter, the term real estate broker does not include . . . any person who is licensed as a securities

> broker-dealer or is licensed as a securities agent representing a broker-dealer pursuant to chapter 80A and who offers to sell or sells an interest or estate in real estate which is a security as defined in section 80A.41(30), and is registered or exempt from registration or part of a transaction exempt from registration pursuant to chapter 80A, when acting solely as an incident to the sale of these securities.

Minn. Stat. § 82.56(j) (2010).

It is clear to us that the sales transaction transferring ownership of all interest in Rupp Industries implicates the license requirements of the Real Estate Broker and Salesperson Act. We turn to PEMS's contention that it was not acting as a broker.

II

PEMS contends that even if the sales transaction here implicates the license requirements for persons acting as a broker, it was not acting as a broker, but rather as a mere "finder" who did not engage in the conduct for which an unlicensed broker is barred from maintaining a commission-collection lawsuit. Again, the plain language of the statute controls our analysis.

We are not persuaded by PEMS that its activities make it a "finder" rather than a "broker" as defined by the act. PEMS recognizes that the Real Estate Brokers and Salespersons Act includes a harsh penalty for unlicensed brokering. A broker acting without a license forfeits his right to collect compensation for his services:

> No person shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts for which a license is required under this chapter without alleging and proving that the person was a duly licensed real estate broker, salesperson, or closing agent at the time the alleged cause of action arose.

Minn. Stat. § 82.85, subd. 1 (2010).

We first address whether Minnesota law recognizes "finders" as distinct from real estate brokers. PEMS offers no caselaw or statute that suggests that such a distinction exists. And we are aware of no Minnesota authority that defines "finder" in any context, let alone this one. But one legal encyclopedia describes a "finder" as

> an intermediary who brings together parties for a business opportunity, and differs from a broker because the finder merely brings two parties together to make their own contract; a finder locates, introduces, and brings parties to a transaction together, while a broker does more, attempting to bring the parties to an agreement.

12 Am. Jur. 2d Brokers § 3 (West 2010). And Black's Law Dictionary 589 (5th ed. 1981) defines "finder" as one who brings two companies together. So there is at least some basis in usage for the legislature to have carved out a distinction, if it chose to do so. But it did not. Even if a theoretical distinction might exist, there is no basis in Minnesota law to exclude "finders" from the broad definition of "real estate broker."

And strong statutory guidance counsels us against inferring a distinction here. The legislature has explained that when it specifically lists exceptions to its enactments, it expects us to apply only those exceptions: "Exceptions expressed in a law shall be construed to exclude all others." Minn. Stat. § 645.19 (2010). The legislature has specified fourteen detailed exceptions to "real estate broker," but none includes "finders." Minn. Stat. § 82.56. It is not our role to write into the statute any additional exception beyond those stated unambiguously.

Even if there is no finder exception, we must still decide whether PEMS's efforts toward the sale here constituted the actions of a broker under the act. The act broadly defines "'Real estate broker' or 'broker'" as

> any person who . . . for another and for commission, fee, or other valuable consideration or with the intention or expectation of receiving the same directly or indirectly lists, sells, exchanges, buys, rents, manages, offers or attempts to negotiate a sale, option, exchange, purchase or rental of any business opportunity or business, or its good will, inventory, or fixtures, or any interest therein.

Minn. Stat. § 82.55, subd. 19(d).

The facts are somewhat disputed as to what PEMS actually did. The unsigned consulting agreement, which PEMS used as a basis for its claims in its complaint, describes the agreed-upon activities of PEMS and which clearly include conduct of a "broker" under the act:

> The services shall include, but not limited to: identifying a suitable business for purchase (Rupp Industries, Inc.); providing financial statements and any other related reports such as but not limited to: business plan, real estate evaluation, customer sales and the use history, corporate policies, strategic planning, executive training goals and methods, business development and marketing, business projections, profile of company personnel, legal matters, labor relations, list of equipment and any patents, assisting with the negotiation of the purchase price for the Business; assisting in determining the value of assets (machinery [and] equipment) and assisting with the negotiation of the terms of the final purchase agreement, including but not limited to financing, allocation of the Purchase Price, and non-compete and confidentiality.

Despite its reliance on this language to support its claim to the commission, PEMS offered evidence that it did not actually perform all of these duties. Slayton's affidavit

describes a narrower role for PEMS. He testifies that "PEMS's role was only to find a suitable buyer and not to negotiate a sale." He also stated, "The modest 2% fee reflects PEMS' limited role as a finder as opposed to a commercial real estate broker which typically requires a rate of twice as much or more in transactions similar in size" to Rupp Industries. And he testified that "PEMS did not participate in Defendants' due diligence process" or "in any negotiations on behalf of any party to the transaction" and that RIA "even closed the transaction without [PEMS's] knowledge." Additionally, Brooke provided an affidavit stating in conclusory fashion, "At all times it has been my understanding that PEMS was acting as a finder, and not a realtor or stock broker, in connection with the sale of Rupp Industries."

Temp-Air urges us to read the statute to mean that a broker includes a person who "offers . . . to negotiate a sale," and that the consulting agreement, at minimum, was an offer to negotiate a sale. Basic grammar prevents us from adopting Temp-Air's interpretation. The organization of the sentence indicates that merely *offering to negotiate* a sale does not qualify a person as a broker. We basically have two interpretive alternatives before us. The first is the one that Temp-Air urges: "'Real estate broker' or 'broker' means any person who . . . for another . . . with the intention or expectation of receiving [a commission], . . . offers . . . to negotiate a sale . . . of any . . . business . . . or any interest therein." The second is the one that we think most comports with the structure of the sentence: "'Real estate broker' or 'broker' means any person who . . . for another . . . with the intention or expectation of receiving [a commission], . . . lists, sells, . . . manages, offers [a sale . . . of any . . . business . . . or any interest therein] or attempts

to negotiate a sale . . . of any . . . business . . . or any interest therein." We recognize that our interpretation would be more grammatically corroborated if a comma separated the two phrases, "rents, manages, offers" and "or attempts to negotiate." But the serial comma is similarly omitted seven words later in the same sentence between the phrases "option, exchange, purchase" and "or rental of any . . . ." We do not think the drafters intended anything more by omitting the comma in the first instance than it did by omitting the comma in the second instance.

Logic supports our interpretation. We cannot conceive any logical reason to treat as a broker a person who merely *offers to negotiate* a sale, but not a person who merely offers to perform other brokerage services, such as to list, to sell, to exchange, etc. Avoiding a nonsensical interpretation, we construe the statute to deem as a broker anyone who "lists, sells, exchanges, buys, rents manages, offers[,] or attempts to negotiate a sale" of a business interest, and that "offer," by itself, refers to the offering of a particular sale or opportunity, which, if it results in a completed actual sale, real estate brokers customarily expect compensation.

Aside from this statutory interpretation contest, undisputed evidence gleaned from the face of the complaint demonstrates that, in fact, PEMS acted as broker, by "list[ing], sell[ing], exchang[ing] . . . offer[ing the sale and] attempt[ing] to negotiate" the sale of Rupp Industries to RIA. The complaint declares that Rupp Industries chose PEMS "to find a suitable buyer and facilitate a purchase of the company." It asserts that PEMS "performed extensive work . . . during a period of nearly three years." It "provided inside information about the company to enable negotiations." "[I]t provided business

information and consulting advice to facilitate the purchase." It "thoroughly analyzed Rupp Industries' business, its financials, and its management team." It "paid all legal fees incurred." It "acted as gatekeeper of Rupp Industries' confidential and proprietary business information." And "[n]o other representative of Rupp Industries provided such information for potential buyers." It also "vetted approximately 15 potential buyers," and RIA "continued to request and use [its] services in the due diligence process." The complaint adds that PEMS "procured the sale of Rupp Industries to RIA," and that without its help, "[n]o sale to RIA could have taken place." A party's factual assertions in its complaint may be admitted as evidence of admission when the allegations arise from the pleader's own behavior and within his knowledge. *In re Perry*, 494 N.W.2d 290, 294 (Minn. 1992); *cf. Kelly v. Ellefson*, 712 N.W.2d 759, 766-68 (Minn. 2006) (limiting use of amended complaint as admission of a party-opponent when the pleading contained alleged facts beyond the pleader's personal knowledge). Nothing in the factual record developed after PEMS's complaint contradicts any of the complaint's allegations of PEMS's brokerage services. Because these facts asserted by PEMS are the basis of its claim for damages against Temp-Air and demonstrate that PEMS acted within the broad range of conduct that describes a broker, we affirm the district court's summary judgment against PEMS for its claims against Temp-Air.

III

We next address summary judgment as to PEMS's fraud claim. To survive summary judgment, PEMS had the burden of proof on each element essential to its claim.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). To prove a claim of fraudulent misrepresentation against Korn, PEMS had to establish five elements:

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer[ed] pecuniary damage as a result of the reliance.

Hoyt Properties, Inc. v. Production Res. Group, L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted).

The district court granted summary judgment based on PEMS's failure to produce facts establishing the causation elements of the alleged fraud, which is that Korn's alleged representation caused PEMS to rely on it, which in turn caused PEMS financial loss. PEMS based its fraud claim on the alleged misrepresentation by Korn that he was a "silent investor" in the transaction and not an "active investor" and that PEMS relied on Korn's status as "silent investor" when it continued to work with Brooke and provide services to RIA. But the district court had difficulty understanding why "Korn's alleged hidden, actual role, in contrast to his perceived-by-PEMS role, would have prevented PEMS from going forward with the investor group."

PEMS attempts to satisfy the reliance element by claiming that if Korn had not misrepresented his true status as an active investor, PEMS would not have treated Brooke and Korn "as a single party . . . bound by PEMS's agreement with Brooke on behalf of the investor group." But both Brooke and Korn indisputably were members of the RIA

investor group, and RIA was the single party to the PEMS agreement. PEMS provides no logical reason or fact establishing that it would have quit dealing with Brooke and RIA had it known the truth about Korn's allegedly misrepresented role. Additionally, it is not the failure of the agreement to bind the parties that results in PEMS's inability to collect its commission; it is PEMS's failure to possess the broker's license required by statute.

PEMS also identifies Korn's supposed failures as Brooke's attorney, such as his alleged usurpation of his client's business opportunity in violation of Minnesota Rules of Professional Conduct 1.8. We fail to see how Korn's alleged professional deficiencies constitute evidence that PEMS relied on Korn's status to its detriment. The district court properly dismissed PEMS's fraud claim against Korn on summary judgment.[1]

IV

We next address PEMS's claim of intentional interference with a prospective economic advantage as pleaded against Korn. We observe that this tort has not yet been recognized in Minnesota. *See Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 n.4 (Minn. App. 2001). But we need not address the tort's viability because, even if the tort exists in Minnesota, it is evident that section 82.85 bars PEMS's recovery under it, just as it barred PEMS's claims against Temp-Air.

Two independent concerns drive our conclusion. First, PEMS's claim against Korn is merely the reframing of its attempt to collect the same $400,000 in compensation

[1] Our analysis of the factual dispute regarding fraud should not be read to suggest that PEMS could avoid the statutory bar to collecting the commission simply by recasting his collection claim under a fraud theory.

for its unlicensed brokerage services that it cannot collect against RIA. The statute broadly prevents "*any* action in the courts of this state for the collection of compensation for the performance of any of the acts for which a license is required" but not held. Minn. Stat. § 82.85, subd. 1; *see also Relocation Realty Servs. Corp. v. Carlson Cos., Inc*., 264 N.W.2d 643, 645–46 (Minn. 1978) (construing a nearly identical version of the statute to prevent an unjust enrichment claim to recover costs for unlicensed work). Construing the statute to bar all types of claims furthers the purposes of the statute, which are explained in *Relocation Realty*:

> If we were to hold that 'action for compensation' did not include the present case it would serve to encourage unlicensed brokerage. An unlicensed broker could operate in this state and be certain that even if its fee was not paid it could always recover costs and interest. This would greatly decrease the risks of doing business by unlicensed brokers and dilute the protections provided to the public.

Id. at 646. Because the statute bars all civil claims for commission by an unlicensed broker, whether fashioned in tort or contract or equity, PEMS cannot escape the intentionally harsh effect of the statute simply by morphing the prohibited claim.

The second concern is similar to the first. The statute's broad prohibition would have little effect if persons providing unlicensed brokerage services for corporations rather than natural persons could simply avoid the absolute bar of the statute by filing interference-based lawsuits against the corporate officers who individually participated in the agreement that the legislature aims to render valueless. We believe that the statute bars intentional-interference claims against anyone, including officers of corporations that secured the unlicensed services, at least when the officer acts within the scope of his

corporate duties. This is consistent with those cases establishing a common-law shield from liability for corporate officers in interference-with-contract claims. *See Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 900 (Minn. 1982) ("Officers of a corporation may not be held personally liable for interference with a contract merely for causing the corporation not to perform the contract."); *Furlev Sales & Assocs., Inc. v. N. Am. Automotive Warehouse, Inc.*, 325 N.W.2d 20, 26 (Minn. 1982) ("The general rule is that officers of a corporation are shielded from personal liability for interference with contracts if they merely cause the corporation not to perform the contract.").

So we assume, without deciding, that tortious interference with a prospective economic advantage may be actionable in Minnesota. Interpreting the statute and applying analogous caselaw, we hold that section 82.85 bars intentional-interference claims against corporate officers for damages based on unpaid compensation for unlicensed real estate brokerage services.

V

The district court properly dismissed PEMS's claims to collect unpaid but unlicensed brokerage services against Temp-Air because they are barred by section 82.85. It also properly dismissed PEMS's fraud claim against Korn for lack of factual support. And PEMS's intentional-interference claim against Korn fails because it is merely a recasting of PEMS's claim for its unpaid commission.

Affirmed.