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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1933**

Drummer Development, Inc.,
Appellant,

vs.

Baxter BBQ, Incorporated,
Defendant,

Charles Torgerson, Jr.,
Respondent,

Randy Jernberg,
Respondent.

**Filed May 30, 2017
Affirmed
Jesson, Judge**

Blue Earth County District Court
File No. 07-CV-15-1963

Michael M. Sawers, Justin P. Weinberg, Briggs and Morgan, P.A., Minneapolis, Minnesota
(for appellant)

Mathew M. Meyer, Meyer Law Office, Shakopee, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Halbrooks, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

JESSON, Judge

A barbecue restaurant had business difficulties after leasing commercial space in Mankato. The landlord, which sought to sell the property to a third party, and the restaurant agreed to terminate the lease early. Appellant Drummer Development, although not the landlord listed on the lease, sued the restaurant's owners who signed a guaranty for unpaid rent, claiming that it had been assigned rights under the lease. The district court concluded that Drummer Development did not have standing to pursue claims under the lease and dismissed the case. We affirm.

FACTS

In 2006, Mankato BBQ Inc. was formed for the purpose of operating a Famous Dave's restaurant in Mankato. The owners of Mankato BBQ included respondents Randy Jernberg and Charles Torgerson, Jr., as well as Michael Drummer, owner of Drummer Development.

Michael Drummer and his wife own Drummer Properties, a separate entity, and in January 2006, Mankato BBQ entered into a ten-year lease with Drummer Properties for the use of commercial property in Mankato. The lease set forth a monthly rent schedule and included a guaranty signed by Torgerson and Jernberg. Under the guaranty, the guarantors promised the landlord, Drummer Properties, full performance of the terms of the lease, including payment of rent.

According to an affidavit from Michael Drummer, Drummer Properties assigned the lease to Jacob Holdings, another of Michael Drummer's companies, for management

and collection of lease payments, and then Jacob Holdings assigned “the rent receivables” to Drummer Development. It is unclear when these purported assignments occurred.

The Famous Dave’s restaurant operated by Mankato BBQ struggled and fell behind on the rent. Michael Drummer received an offer to sell the commercial property, and Drummer Properties and Mankato BBQ agreed to terminate the lease early. A termination-of-lease agreement was executed in June 2012 by lessors Michael Drummer and his wife, individually and doing business as Drummer Properties, and by lessee Mankato BBQ. Michael Drummer subsequently sold the commercial property.

The parties disagreed on the intended effect of the termination-of-lease agreement on past-due rent. In August 2014, Drummer Development served a complaint against several parties, including Torgerson and Jernberg. The complaint alleged three counts, but the only count relevant to this appeal, count one, alleged breach of the original lease and breach of guaranty obligations by Torgerson and Jernberg.

Drummer Development moved for summary judgment, arguing that Torgerson and Jernberg owed obligations under the lease and guaranty. Torgerson and Jernberg moved for summary judgment, arguing that Drummer Development lacked standing; notice of default was never provided under the terms of the lease; and the termination of the lease precluded the relief sought by Drummer Development.

In a thorough opinion, the district court denied Drummer Development’s motion and granted Torgerson’s and Jernberg’s motions for summary judgment. Count one was dismissed with prejudice. The district court concluded that Drummer Development did not have standing to pursue the breach-of-lease and guaranty claims because Drummer

Development was not a party to, and was not validly assigned, the lease. This appeal follows.

DECISION

Summary judgment is proper 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. On appeal from summary judgment, appellate courts review de novo “whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts.” *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015).

Although Drummer Development raises a number of issues on appeal, we need only address the legal question of standing, which we review de novo. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004). To have standing, a party must have a sufficient stake in the controversy to be decided. *Id.* “A sufficient stake may exist if the party has suffered an ‘injury-in-fact’ or if the legislature has conferred standing by statute.” *Id.* A party commencing an action “must show some personal stake in the outcome . . . to assure adverseness and injury or threat of injury to a legally recognized, rather than personal, interest.” *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 596 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987).

Drummer Development claims that Torgerson and Jernberg breached the terms of the lease and guaranty. Generally, only a party to a contract may seek to enforce it. *N. Nat’l Bank of Bemidji v. N. Minn. Nat’l Bank of Duluth*, 244 Minn. 202, 208, 70 N.W.2d

118, 123 (1955). Drummer Development was not a party to the lease or guaranty and would ordinarily have no rights to enforce those agreements.¹ *Envall*, 399 N.W.2d at 596. But Michael Drummer asserts that Drummer Properties assigned the lease to Jacob Holdings, and Jacob Holdings assigned “the rent receivables” to Drummer Development. This non-specific assertion is insufficient to establish Drummer Development’s standing for four reasons.

First, there is a lack of evidence that Jacob Holdings was assigned the lease by Drummer Properties. There is nothing in writing. *See* Minn. Stat. § 513.04 (2016) (prohibiting assignment of a lease exceeding one year, unless in writing or by operation of law). Further, the termination-of-lease agreement does not reflect such an assignment. The termination-of-lease agreement was not executed by Jacob Holdings or Drummer Development; it was executed by Michael Drummer and his wife, individually and doing business as Drummer Properties. This is an additional undisputed fact (beyond the lack of a written assignment) indicating that no assignment occurred. *See Hardle v. Preston Energy, Inc.*, 374 N.W.2d 807, 809 (Minn. App. 1985) (concluding that there was insufficient evidence of an assignment when there was no evidence of relinquishment of control).

Second, because there is insufficient evidence of an assignment of the lease to Jacob Holdings, it follows that there is insufficient evidence that Jacob Holdings assigned an

¹ Although intended third-party beneficiaries of a contract may in some instances obtain rights under a contract, Drummer Development has made no argument that it is a third-party beneficiary.

interest in the lease to Drummer Development. Jacob Holdings could not transfer an interest that it did not possess.

Third, even if there was evidence of an assignment to Jacob Holdings, the lease itself required that rent “shall be paid” to the “Landlord,” which was Drummer Properties. And the lease *prohibited* provisions of the lease from being “amended or added to except by agreement in writing signed by the parties or their respective successors in interest.” There is no signed writing amending the lease to indicate payment of rent to either Jacob Holdings or Drummer Development.

Finally, there is nothing in the record suggesting when the purported assignments occurred, and Michael Drummer’s wife and business partner in Drummer Properties offered no clarification regarding any assignments. If the assignments had occurred prior to the termination-of-lease agreement, that document does not reflect those assignments. And there is no assertion in Michael Drummer’s affidavit that Drummer Development was assigned rights under the termination-of-lease agreement.

Drummer Development argues that Torgerson and Jernberg cannot attack the lack of written assignments because Torgerson and Jernberg were not parties to the assignments. *See Parkside Mobile Estates v. Lee*, 270 N.W.2d 758, 762 n.4 (Minn. 1978) (stating that nonparties to an assignment could not assert the statute of frauds in their favor). Torgerson and Jernberg assert that this argument was not raised below and has been forfeited. Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

While we conclude that Drummer Development's argument was properly raised below, it does not change our determination that there is insufficient evidence of an assignment. As the party resisting summary judgment, Drummer Development needed to "do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Given the dearth of evidence of an assignment, Michael Drummer's mere assertion that one occurred is insufficient to create a genuine issue of material fact. *See Hardle*, 374 N.W.2d at 809.

Neither Michael Drummer, individually, nor Drummer Development was a party to the lease or guaranty. *See Anderson v. First Northtown Nat'l Bank*, 361 N.W.2d 116, 117-18 (Minn. App. 1985) (holding that sole shareholder of corporation did not have standing to sue on corporation's behalf, despite the fact that he signed documents for the corporation). And there is insufficient evidence to create a genuine issue of material fact over whether Drummer Development was assigned an interest under the lease or guaranty. Therefore, Drummer Development does not have standing, and the district court properly granted summary judgment to Torgerson and Jernberg.

Affirmed.