STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0421

KLC Financial, Inc.,
Appellant,

vs.

Plymouth Harvest Grill, LLC, et al.,
Defendants,

Aspen Showroom, Inc., et al.,
Respondents.

Filed October 30, 2017
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-15-9291

Dennis A. Dressler (pro hac vice), Dressler | Peters, LLC, Chicago, Illinois; and

John A. Halpern, Steven L. Ugland, Halpern Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Michael L. Brutlag, Brutlag, Hartmann & Trucke, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

BJORKMAN, Judge

In this case arising from a financing agreement, appellant challenges summary judgment dismissing its claims of common-law and statutory fraud, unjust enrichment, and money had and received. Because there are no issues of material fact and respondents are entitled to judgment as a matter of law, we affirm.

FACTS

In the spring of 2013, Aspen Builders, Inc., a general contractor, entered into a $397,670 contract with defendant Plymouth Harvest Grill, LLC to construct its restaurant space. Respondent Jorj Erkan Ayaz, president of Aspen Builders, had no prior dealings or relationship with defendant Jason Hines, the owner of Harvest Grill. The construction project was financed by "Mr. Lee," the owner of the building in which Harvest Grill was located. Lee issued a check for $378,000 to Aspen Builders.

Contemporaneously with receiving the $378,000 check, Aspen Builders agreed to provide a $150,000 short-term loan to Harvest Grill for "non-construction expenses." According to Ayaz, Aspen Builders provided the loan because Hines needed "some of [his] funds back so that [he] [could] buy [his] sign and whatever else he needed to do the restaurant build out." In exchange for the loan, Hines issued Ayaz two checks that he directed Ayaz to hold until the project was "further ahead" and sufficiently funded. Ayaz told Hines that the loan would have to be repaid before Aspen Builders exhausted the rest of the funds Lee provided.

Aspen Builders exhausted the remaining funds by the fall of 2013 and halted work on the project. The project remained dormant for several months while Hines sought financing from other sources. Hines contacted Ayaz six or seven times to report that he had found new financing for the project, but the funding never materialized. Initially, Ayaz scheduled workers to resume work, but he quit doing so after Hines repeatedly failed to obtain financing for the project.

In May 2014, Harvest Grill and defendant KB&J Enterprises, Inc. entered into a $154,000 financing agreement with a new lender, appellant KLC Financial, Inc. The financing agreement pertains to the purchase of restaurant furniture described in a $154,390 invoice purporting to be from respondent Aspen Showroom, Inc. Hines submitted the invoice to KLC. Aspen Showroom sells construction products, and Ayaz is its president. He denies generating the invoice and states that it describes products that Aspen Showroom did not sell. The financing agreement lists KLC as the creditor, and Harvest Grill, Hines, and KB&J as co-debtors. Hines and Harvest Grill executed personal and corporate guaranties to secure "payment and performance of all obligations" owed to KLC as provided for in the financing agreement.

Hines contacted Ayaz in mid-May to report that he had obtained financing for the construction project, and brought Ayaz to a restaurant in Minneapolis to meet KLC's representative. On the sidewalk outside the restaurant, Hines introduced Ayaz to the KLC representative, who asked Ayaz if he was with Aspen Showroom; Ayaz responded that he was. The KLC representative then handed an envelope to the men and went back inside the restaurant. When Ayaz glanced inside the envelope, he noticed that the $154,000 check

was erroneously made payable to Aspen Showroom, rather than Aspen Builders. He "immediately objected," telling Hines that the check was payable to "the wrong company's name." Hines suggested that Ayaz endorse the check as written and then transfer the funds from Aspen Showroom to Aspen Builders. Ayaz told Hines that he "did not believe a business check could be endorsed in this manner."

Hines disagreed, and he brought Ayaz to Hines's banker at Wells Fargo Bank to obtain the banker's opinion on how the check could be endorsed. Hines's banker informed them that Ayaz could endorse the check over to Harvest Grill, which could then issue a check to Aspen Builders. Ayaz then endorsed the check over to Harvest Grill. Ayaz later testified at his deposition that, when Wells Fargo became involved in the transaction, he believed that he was under the "guidance" of "a national bank" and was "not dealing with an individual anymore." According to Ayaz, when he agreed to endorse the check over to Harvest Grill, Hines promised, "I will get this back to you shortly."

The next day, a KLC representative contacted Ayaz asking why he had endorsed the check over to Harvest Grill and whether Aspen Showroom had ever sold anything to Hines. Ayaz responded that he had "nothing to do with [Hines's] financing and his practices of pulling money out." KLC attempted to stop payment on the check, but Hines had already used the proceeds to issue a series of cashier's checks. Ayaz later learned about the fraudulent invoice.

KLC sued Aspen Showroom, Ayaz, Harvest Grill, Hines, and KB&J, alleging common-law fraud; statutory fraud under the Minnesota Uniform Fraudulent Transfer Act

(UFTA), Minn. Stat. §§ 513.41-.51 (2014)[1]; unjust enrichment; and money had and received. KLC also alleged that Ayaz is personally liable for Aspen Showroom's conduct under a corporate veil-piercing theory. KLC deposed Ayaz and Kevin MacIntosh, a commercial lender for Wells Fargo Bank, but KLC did not depose Hines.[2] Aspen Showroom and Ayaz moved for summary judgment, arguing that KLC's claims fail as a matter of law because they lack evidentiary support. KLC also moved for summary judgment in its favor.

The district court granted Ayaz and Aspen Showroom's motion for summary judgment, ruling that KLC had failed to allege genuine issues of material fact to preclude summary judgment for Ayaz and Aspen Showroom. KLC appeals.

D E C I S I O N

Summary judgment is appropriate if the record "show[s] 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. A party opposing summary judgment "must do more than rest on averments or denials of the adverse party's pleadings." *Citizens State Bank Norwood Young Am. v. Brown*, 849 N.W.2d 55, 61-62 (Minn. 2014). "[S]ummary judgment is proper when the nonmoving party fails to provide the court with *specific*

[1] "Sections 513.41 to 513.51 may be cited as the 'Uniform Fraudulent Transfer Act.'" Minn. Stat. § 513.51. UFTA has been amended and renamed Uniform Voidable Transactions Act; UFTA applies to transactions that occurred before August 1, 2015. 2015 Minn. Laws ch. 17, §§ 12-13, at 164.

[2] Hines, Harvest Grill, and KB&J are not parties to this appeal. In its summary-judgment decision, the district court noted that Hines had filed for bankruptcy.

indications that there is a genuine issue of fact." *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988) (emphasis added). In ruling on a summary-judgment motion, "the [district] court may consider all admissible evidence, including witness affidavits." *Ariola v. City of Stillwater*, 889 N.W.2d 340, 358 (Minn. App. 2017), *review denied* (Minn. Apr. 18, 2017). We review summary judgment de novo "to determine whether any genuine issue of material fact exists and whether the district court correctly applied the law." *Citizens State Bank*, 849 N.W.2d at 61.

I. KLC's common-law fraud claim fails as a matter of law.

To prevail on a claim of common-law fraud, a party must prove the following elements:

> (1) . . . 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 Props., Inc. v. Prod. Res. Grp., L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (alteration in original) (quotation omitted). Minn. R. Civ. P. 9.02 requires that fraud be pleaded "with particularity," which means the complainant must "plead the ultimate facts or the facts constituting fraud." *Hardin Cty. Sav. Bank v. Hous. & Redev. Auth. of the City of Brainerd*, 821 N.W.2d 184, 191 (Minn. 2012) (quotation omitted).

KLC's common-law fraud claim fails for two reasons. First, KLC did not produce competent evidence that Ayaz and Aspen Showroom made any false representations to

KLC. KLC asserts that Ayaz made false representations by (1) issuing the false invoice from Aspen Showroom with knowledge of Hines's false representations to obtain the $154,000 check from KLC and (2) responding affirmatively to the KLC representative's question of whether he was "with Aspen Showroom." Unrebutted evidence produced by Ayaz and Aspen Showroom defeats these allegations. In support of summary judgment, Ayaz produced his own affidavit and other evidence that he and Hines did not know each other before the restaurant construction project and took separate actions with regard to their individual interests in the project. Ayaz averred that he took no part in issuing the false invoice from Aspen Showroom, was unaware of its existence until after Hines diverted KLC's funds to himself, and had no knowledge of Hines's fraudulent conduct in obtaining the $154,000 check from KLC. The street encounter between Hines, Ayaz, and the KLC representative was brief, consisting of Ayaz obtaining from the KLC representative what Ayaz believed would be a long-awaited construction financing check and truthfully responding to the representative's sole question—whether he was "with Aspen Showroom." Upon viewing the check, Ayaz immediately identified the mislabeling problem and attempted to lawfully correct it. When KLC questioned him the next day, after the check had been cashed, Ayaz accurately advised that Hines had not purchased anything from Aspen Showroom.

KLC argues that Ayaz's answer to Interrogatory No. 6 creates a genuine issue of material fact as to Ayaz's knowledge and participation in Hines's fraudulent conduct. We are not persuaded. Ayaz's answer to Interrogatory No. 6 is largely consistent with his affidavit and deposition testimony, with the exception of one sentence, which states, "Hines

next approached Ayaz and told him that he had successfully set up the funding, but that a check would be written to Aspen Showroom." That sentence, when read alone, suggests Ayaz learned before the street encounter with the KLC representative that KLC would be paying the wrong company. But in the same interrogatory answer, Ayaz also states that he repudiated Hines's suggestion and "told Hines that any check would have to be written to Aspen Builders and not Aspen Showroom." When viewed in context, Ayaz's statement is consistent with his affidavit and deposition testimony, is uncontroverted by KLC, and contradicts any inference that Ayaz conspired with Hines to commit fraud.

Second, Ayaz did not have an affirmative duty to disclose information to KLC. A claim for fraud based on the failure to disclose material facts fails "unless special circumstances have created a fiduciary relationship." *Karlstad State Bank v. Fritsche*, 392 N.W.2d 615, 618 (Minn. App. 1986); *see Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365, 244 N.W.2d 648, 650 (1976) ("Before nondisclosure may constitute fraud, . . . there must be a suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to have communicated to him."). KLC alleged no facts to show that Ayaz and KLC were in a fiduciary relationship with respect to the financing agreement. Indeed, Ayaz was not a party to the agreement, which was between KLC, Hines, KB&J, and Harvest Grill. And even if Ayaz's acts of accepting KLC's check and endorsing it over to Harvest Grill could be construed

as a false representation, the undisputed record demonstrates KLC did not act in reliance on such a representation.[3]

In sum, KLC's bare allegations are insufficient to defeat summary judgment. Ayaz's affidavit and deposition testimony establish that he did not create the false invoice, make false statements to KLC, or engage in conduct from which fraudulent intent by Ayaz could be inferred. Because KLC did not rebut this evidence, its fraud claim fails as a matter of law. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) (stating that party opposing summary judgment "must present more than evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions" (quotation omitted)).

II. KLC's statutory fraud claim under UFTA fails as a matter of law.

UFTA "prohibits a debtor from transferring property with the intent to hinder, delay, or defraud any creditors." *New Horizon Enters., Inc. v. Contemporary Closet Design, Inc.*, 570 N.W.2d 12, 14 (Minn. App. 1997). UFTA provides that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation" with actual fraudulent intent or "without receiving a reasonably equivalent value in exchange for the transfer or obligation." Minn. Stat. § 513.44(a). KLC argues that the district court erred by dismissing KLC's UFTA claim on

[3] While KLC appears to assert that Ayaz's conduct amounted to fraudulent concealment, KLC did not specifically plead this cause of action in its complaint. *See* Minn. R. Civ. P. 9.02 (requiring fraud to be pleaded "with particularity").

the ground that there is no evidence of fraud involved in the transfer of KLC's $154,000 check from Aspen Showroom to Harvest Grill. We disagree.

By its terms, UFTA applies only in the context of a creditor-debtor relationship. No such relationship exists between KLC and Aspen Showroom or Ayaz.[4] UFTA defines a "creditor" as "a person who has a claim," and a "debtor" as "a person who is liable on a claim." Minn. Stat. § 513.41(4), (6). UFTA controls transfers of assets from debtors to third parties only under limited circumstances. Minn. Stat. § 513.45(b) makes a transfer by a debtor to a third-party "insider" fraudulent, for example, only "if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." An "insider" is defined to include various relationships between debtors and third parties, such as a relative of an individual debtor, or an affiliate of the debtor. Minn. Stat. § 513.41(7)(i)(A), (iv). KLC has not alleged facts that would establish that Ayaz or Aspen Showroom were third-party insiders to any fraudulent transfer between KLC and Hines. Thus, UFTA does not apply.[5]

In rejecting the UFTA claim, the district court also relied on the "lack of evidence suggesting fraudulent conduct on the part of Aspen Showroom or Ayaz." Although not

[4] The district court noted that Ayaz and Aspen Showroom made this argument in support of summary judgment, but the court did not rule on the issue. But this court "may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

[5] Because UFTA does not apply, we decline to address KLC's argument that the badges-of-fraud factors set forth in UFTA demonstrate actual fraud in this case. *See* Minn. Stat. § 513.44(b)(1)-(11) (2014).

necessary to our decision, we note that this analysis is also sound. As discussed above, Ayaz and Aspen Showroom presented evidence that Ayaz and Hines had an arms-length business relationship in the restaurant construction project, and Ayaz was unaware of and played no intentional part in Hines's fraudulent conduct in transferring funds from KLC to himself. KLC presented no competent contradictory evidence. While it is normally a question of fact whether a debtor has made a fraudulent transfer under UFTA, "when no genuine issue of material fact exists, the district court may decide the question as a matter of law on a motion for summary judgment." *Citizens State Bank*, 849 N.W.2d at 65.

III. Ayaz and Aspen Showroom are entitled to summary judgment on KLC's unjust-enrichment and money-had-and-received claims.

"The elements of an unjust enrichment claim are: (1) a benefit conferred; (2) the defendant's appreciation and knowing acceptance of the benefit; and (3) the defendant's acceptance and retention of the benefit under such circumstances that it would be inequitable for him to retain it without paying for it." *Dahl v. R.J. Reynolds Tobbaco Co.*, 742 N.W.2d 186, 195 (Minn. App. 2007), *review granted* (Minn. Feb. 27, 2008), *and order granting review vacated* (Minn. Jan. 20, 2009). To be unjust, enrichment must be illegal or unlawful, *id.* at 196, or "morally wrong," *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). Likewise, a claim for money had and received "has been invoked in support of claims based upon failure of consideration, fraud, mistake, and in other situations where it would be morally wrong for one party to enrich himself at the expense of another." *Olson v. Moorhead Country Club*, 568 N.W.2d 871, 872-73 (Minn. 1997) (quotation omitted).

KLC first argues that it established Ayaz benefitted from fraudulent acts by depositing and retaining—if only briefly—the proceeds of KLC's check. While the $154,000 check was payable to Aspen Showroom, neither that entity nor Ayaz retained any benefit from the check. Ayaz immediately endorsed KLC's check over to a company under Hines's control. Ayaz may have expected to indirectly benefit from the KLC check because he hoped that Hines would use those funds to complete the construction project, but KLC made no showing that Aspen Showroom or Ayaz received or retained an actual benefit by endorsing the check. KLC cites no authority for its argument that Ayaz's momentary control over the check constitutes retention of a benefit. Accordingly, KLC's unjust-enrichment and money-had-and-received claims fail as a matter of law. *See, e.g.*, *First Nat'l Bank v. Ramier*, 311 N.W.2d 502, 503-04 (Minn. 1981) (declining to create a constructive trust in real property in favor of a bank lender under an unjust-enrichment theory when bank gave an unsecured loan to an individual borrower who died while jointly owning the subject property with a spouse).

KLC next contends that the district court erred by requiring evidence of fraudulent intent to sustain the unjust-enrichment and money-had-and-received claims. This argument is unavailing. The district court merely commented that both claims are "closely linked" to the fraud claim. Ultimately, the district court applied only the required elements for unjust-enrichment and money-had-and-received claims. And even if the district court misapplied the law, we review the entry of summary judgment de novo, and are not bound by a district court's analysis. *Doe 76C*, 817 N.W.2d at 163 (recognizing that an appellate court may affirm summary judgment "on any grounds").

IV. Ayaz is entitled to summary judgment on the claim that he is personally liable under a corporate veil-piercing theory.

"A court may pierce the corporate veil to hold a party liable for the acts of a corporate entity if the entity is used for a fraudulent purpose or the party is the alter ego of the entity." *Equity Trust Co. Custodian FBO Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 339 (Minn. App. 2009). This equitable remedy "is generally a creditor's remedy used to reach an individual who has used a corporation as an instrument to defraud creditors." *Roepke v. W. Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn. 1981). A corporate veil may be pierced under the "alter ego" theory if various factors are shown, including

> insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely façade for individual dealings.

Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 512 (Minn. 1979). KLC offered no evidence that would support a veil-piercing claim under the "alter ego" theory. As the district court noted, "there is no evidence in the record suggesting that Ayaz received any personal benefit as [a] result of the transaction in question," and KLC "rests on mere averments and conclusory statements to accuse Ayaz of wrongdoing."

KLC alleged that Ayaz "personally directed" the conduct of Aspen Showroom for his own benefit and used Aspen Showroom as his alter ego "by which he obtained KLC's Funds which he diverted from their intended purpose." As with KLC's other claims, this

claim cannot survive a motion for summary judgment because KLC has not met its burden to come forward with evidence establishing material-fact issues for trial.

In sum, based on this record and the arguments presented, we conclude that Ayaz and Aspen Showroom are entitled to summary judgment dismissing KLC's equitable, common-law, and statutory-fraud claims.

Affirmed.