STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1544

Mid Country Tower Services,
Appellant,

vs.

Cemstone Products Company,
Respondent.

Filed July 6, 2021
Affirmed
Reyes, Judge

Dakota County District Court
File No. 19HA-CV-20-412

Daniel M. Gallatin, Gallatin Law, PLLC, Hugo, Minnesota (for appellant)

Lars C. Erickson, Benjamin J. Kirk, The Coleman Law Firm, LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from the district court's grant of summary judgment for respondent-concrete manufacturer, appellant-wireless-transmission-tower builder argues that the district court erred by determining that (1) appellant asked respondent to modify the final load of concrete, barring appellant's claim that respondent breached the contract and (2) a

limitation-of-remedies clause in respondent's load tickets precluded appellant's requested relief. We affirm.

FACTS

Appellant Mid Country Tower Services constructs wireless-transmission towers. Its owner, Jon Adams, asked respondent Cemstone Products Company for pricing information for the concrete necessary for a project in Wisconsin (the project). The project specifications required concrete with a 28-day compressive strength of 4,500 pounds per square inch (psi). A sales representative for Cemstone responded to Adams with a proposal.

About a month and a half later, Mid Country ordered 158 cubic yards of two types of concrete: W4666 with a compressive strength of 4,500 psi and Xfoot5 with a compressive strength of 5,000 psi. Cemstone confirmed the order in a letter. Cemstone also provided Mid Country with specification sheets for each product. These sheets identify product properties and ingredients, including the amount of air in each product expressed as a percentage range: 6% plus or minus 1.5%, which is 4.5% to 7.5%, for W4666; and 4% plus or minus 1.5%, which is 2.5% to 5.5%, for Xfoot5. The specification sheets also state that "[t]he addition of other constituents and/or admixtures to this mix could cause the plastic and/or hardened properties to vary significantly from the [] mixture design" and "disclaim and negate any warranty of [the] concrete mix design if it is modified in any way." Mid Country acknowledges receiving specifications for the products.

Cemstone delivered the concrete in 16 loads, each of which came with a load ticket and certificate of compliance showing the composition of each load. The load tickets state

that "[t]he sole and exclusive liability of Cemstone for any defect in the accepted goods shall be limited to repairing or replacing the goods as Cemstone shall elect" (limitation-of-remedies clause). Cemstone delivered primarily Xfoot5 concrete, and the certificates of compliance show that each load had between ten and 15 ounces of air added. Before delivery of the final load, Adams called Cemstone, and the following exchange took place:

> ADAMS: And then uhh, that last truck, can we get air in there between 5 and 8, 8 percent?
> CEMSTONE REPRESENTATIVE: On the last one, OK?
> ADAMS: Yep, on, on the very last, last one. And then I think that'll do it, but I'll call you for a balance but that should be plenty of con . . . uh . . . con, concrete, but . . .
> CEMSTONE REPRESENTATIVE: OK we'll get you three more full ones and the last one we'll make sure to put extra air in it.
> ADAMS: Alright, thanks.

Cemstone added air to the final load, which also consisted of Xfoot5 concrete. The accompanying certificate of compliance showed additional air was added.

Later, a quality-control check revealed that the final load of concrete did not have the requisite compressive strength. Mid Country had to conduct additional investigation to determine whether other loads failed to meet the project specifications. Only the final load did not meet the project specifications. Nevertheless, the project remains in place, and Mid Country did not seek repair or replacement of the concrete. However, it sued Cemstone in conciliation court, alleging Cemstone breached the contract with Mid Country and seeking $12,811.60 in damages for the costs of the investigation.

The conciliation court entered judgment in favor of Mid Country in the amount of $14,000. Cemstone removed the case to district court in January 2020. It filed a motion

for summary judgment in August 2020, which Mid Country opposed. The district court stated in its order that the only disputed issue is which party is responsible for the composition of the final load. It determined that there were no genuine issues of material fact because "Adams clearly and unequivocally requested" that Cemstone add air to the final load. It therefore determined that Cemstone did not breach the contract and is entitled to summary judgment. The district court also stated in the alternative that, even if Cemstone breached the contract, the limitation-of-remedies clause in Cemstone's load tickets precluded Mid Country's claim for relief. This appeal follows.

DECISION

I. The district court did not err by determining that Mid Country requested the modified concrete and granting summary judgment in favor of Cemstone.

Mid Country argues that the district court erred by ruling that it requested more air in the concrete. It asserts that the meaning of Adams's phone call is a question of fact subject to multiple reasonable interpretations and that the district court inappropriately inferred facts against Mid Country. We disagree.

In reviewing a district court's grant of summary judgment, we review de novo "whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 989 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). We view the evidence in the light most favorable to the nonmovant, resolving all doubts and factual inferences in its favor. *Id.* (quotations omitted).

On a motion for summary judgment, the movant must first show the absence of a factual dispute. *Id.* Then, the nonmovant has the burden of asserting specific facts, based on the record as a whole, that show a genuine dispute of material fact. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71-72 (Minn. 1997). The nonmovant must present more than a metaphysical doubt as to facts, "mere averments," *id.* at 71, or conclusions without specific factual support, *Grandnorthern, Inc. v. W. Mall P'ship*, 359 N.W.2d 41, 44 (Minn. App. 1984). And when reasonable minds do not differ on a question of fact, the district court may decide the question as one of law. *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 684-85 (Minn. App. 2010).

Mid Country relies on the phone call, specifically Adams's use of the word "can," to argue that he only inquired into Cemstone's ability to add air rather than requested to add air. We are not persuaded. The parties do not dispute what Adams and the Cemstone representative said in their dialogue. The only issue is whether reasonable minds could differ as to the interpretation of that dialogue. Adams asked Cemstone with respect to the last truck, "[C]an we get air in there between 5 and 8, 8 percent?" In response, Cemstone asked, "[O]n the last one, OK?" Adams responded, "Yep, on, on the very last, last one. And then I think that'll do it . . . ." When Cemstone stated that it would "put extra air in" the final load, Adams stated, "Alright, thanks." When viewed in the light most favorable to Mid Country, the dialogue taken as a whole leads only to one reasonable conclusion: Adams asked Cemstone to add extra air to the last load and twice confirmed that request. We conclude that, because there are no issues of material fact on Mid Country's breach-

of-contract claim, the district court did not err by granting summary judgment in favor of Cemstone.

II. We need not address Mid Country's limitation-of-remedies argument because our resolution of the first issue is dispositive, and Mid Country forfeited this argument.

Mid Country argues that the limitation-of-remedies clause on Cemstone's load tickets is not part of the contract because (1) a contract modification is not effective without consideration and (2) Mid Country never assented to the modification. However, our conclusion in part I is dispositive: because Cemstone did not breach the contract, Mid Country is not entitled to its requested relief.

Moreover, appellate courts generally do not consider arguments not raised before the district court, and a party cannot shift theories on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). The record shows that Mid Country did not challenge the validity of Cemstone's limitation-of-remedies clause at the district court. Instead, Mid Country's arguments focused on whether it requested added air or merely inquired as to Cemstone's ability to add air. We therefore conclude that Mid Country forfeited this argument.

Affirmed.