STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1389

NSE, Inc., et al.,
Appellants,

vs.

C. G. H., Corp., et al.,
Respondents.

Filed May 23, 2022
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CV-20-4895

Arthur G. Boylan, Philip J. Kaplan, Ryan M. Lawrence, Anthony Ostlund Louwagie Dressen & Boylan P.A., Minneapolis, Minnesota (for appellants)

Donald R. McNeil, Elizabeth Ridley Scott, Heley, Duncan & Melander, PLLP, Minneapolis, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

This dispute arose after husband-and-wife entrepreneurs and their corporation began operating a coupon-production business they purchased for $1.5 million and some of the business's clients stopped using the coupon service. The district court granted summary judgment, dismissing the business purchasers' various claims that its seller had

misrepresented or omitted facts bearing on the purchase. Because the purchasers on appeal have identified no material fact dispute supporting their theory that the seller materially misrepresented or omitted facts about the usefulness and value of the product, about profit margins, about shipping, about the amount of competition the business faced, about the health of the business's client relationships, or about the financial outlook of the business, we affirm the district court's summary judgment decision.

FACTS

Vickie Johnson owned C.G.H. Corporation, which operated under the name Refrigerator Media Advertising (RMA), and which produced periodically released coupons attached to refrigerator magnets. The corporation's clients paid RMA to include their coupons advertising client merchandise on the RMA magnets, which RMA distributed to the clients' potential consumers.

Johnson wanted to retire from her RMA business ownership, and she engaged a broker to market RMA and facilitate its sale. The broker compiled a business profile based on RMA's patent- and trademark-protected refrigerator-magnet product and based on financial information that Johnson provided. In June 2019 husband-and-wife business partners Scott and Katherine Engstrom proposed purchasing RMA for $1.7 million. Johnson accepted the preliminary offer.

In the months following the proposal, the Engstroms conducted a due-diligence investigation into the potential purchase. They requested information about RMA's active customers, and they interviewed Johnson in-person and in a conference call. Johnson provided the Engstroms with the requested information about RMA's customers. She listed

all the customer sales in 2019, including the dollar value for each sale, and she included the data for pending sales and scheduled projects. She answered the Engstroms' questions about RMA, including questions about marketing RMA's coupon service, scheduling services with customers, consistency of customer projects, and seasonal trends. The Engstroms also relied on their lender's appraisal of RMA's value. The lender considered information that Johnson provided, RMA's tax returns, financial statements, and detailed information about the economy and direct-mail marketing businesses in general. The lender determined that RMA's fair market value was $1.51 million.

The Engstroms negotiated the purchase price down to $1.5 million based on the appraisal, memorialized the deal in an executed purchase agreement under the name of NSE Inc., and financed the purchase with a combination of a loan and seller financing. They began operating the business in September 2019.

RMA sold its coupon services to clients on a project-to-project basis, and none of its clients were contractually obligated to continue with future projects. After NSE and the Engstroms took control of RMA, some clients continued with coupon projects with RMA. But in October 2019 one longstanding RMA client opted not to continue with a new coupon project, and another client did the same in February 2020. One month later, the Engstroms defaulted on their loan obligation to pay Johnson and C.G.H.

The Engstroms then sued Johnson and C.G.H. in March 2020, alleging that Johnson materially breached the representations and warranties in the purchase agreement. After discovery, Johnson and C.G.H. moved for summary judgment. The Engstroms opposed the motion, raising six theories of recovery that differed from the theories acknowledged in

their answers to discovery requests defining their claims. Over Johnson's objection, the district court's summary-judgment order addressed the new theories in addition to the ones expressly asserted, reasoning that the theories were within the possible reach of the allegations in the complaint. The district court granted summary judgment favoring Johnson and C.G.H., dismissing all claims raised by the Engstroms and NSE.

This appeal follows.

DECISION

The Engstroms and NSE, whom we refer to collectively as the Engstroms, challenge the district court's summary-judgment decision favoring Johnson and C.G.H., whom we refer to collectively as Johnson. We first address the scope of our review considering the Engstroms' responses to discovery requests directed at defining their claims under specific theories of liability. We then turn to the merits of the claims under those theories. For the following reasons, we conclude that no fact dispute prevents summary judgment on the Engstroms' theories.

I

We need not limit the scope of our review on appeal in the manner that Johnson urges. Johnson supports the merits of the district court's decision but argues that the district court unnecessarily considered theories of liability that were foreclosed by the Engstroms' responses during discovery. One of Johnson's interrogatories asked the Engstroms to specify all the instances that Johnson materially breached the purchase agreement. The Engstroms answered identifying five specific circumstances of alleged breach. But in opposing Johnson's summary-judgment motion, the Engstroms raised six arguments.

Johnson contends the Engstroms therefore impermissibly expanded their theory of breach-of-contract liability beyond those circumstances. The contention fails.

The Engstroms responded to Johnson's interrogatory asking the Engstroms to "state in detail every instance that [the Engstroms] contend that [Johnson] materially breached the Asset Purchase Agreement," by specifying their allegation that (1) "[Johnson] failed to disclose material information about the status of its customer relationships," (2) Johnson failed to provide true and correct business records that "fairly presented the financial condition of [RMA], and did not omit any information that would have a material [effect on RMA]," (3) Johnson did not disclose that "being underbid had become a substantial problem," (4) Johnson knew that the coupon magnets "no longer provid[ed] a good return on investment," and (5) "Johnson failed to meet delivery deadlines." Responding to Johnson's urging not to consider any of the Engstroms' arguments supporting a theory that exceeded the Engstroms' interrogatory response, the district court reasoned that the Engstroms had left "enough room in the complaint for their current arguments." It then thoroughly addressed those arguments. A side-by-side comparison of the Engstroms' discovery response and their brief opposing summary judgment reveals that the Engstroms also left enough room in their interrogatory response on the expanded theories.

We therefore consider if there are fact disputes about whether Johnson materially misrepresented or omitted facts about the usefulness and value of RMA's refrigerator magnets, about RMA's diminishing profit margins, about timely shipping, about the amount of competition RMA faced, about the health of her customer relationships, and about RMA's financial outlook.

II

The Engstroms argue that the district court erred by granting summary judgment favoring Johnson on their breach-of-contract claim. We review de novo the district court's grant of summary judgment, and we will reverse if the record contains a genuine issue of material fact or if the district court erred applying the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). We construe any disputed facts in favor of the party against whom the district court entered summary judgment. *Minn. Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 513 (Minn. 2014). The record reveals no legal error or fact disputes that would prevent summary judgment.

We first consider the Engstroms' argument that the district court erroneously imposed on them a duty to investigate. We have explained that, although some situations require a party suspecting fraud to investigate, "a party is under no duty to investigate a fraud it has no reason to suspect." *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 685 (Minn. App. 2010). We do not read the district court's analysis as imposing a duty to investigate. The district court observed that the Engstroms had the opportunity to inquire further about information that Johnson provided them if they wanted more detail. This observation is better understood as recognizing the Engstroms' choice not to investigate the business's value more thoroughly. The Engstroms' argument misinterprets the district court's reasonable and undisputedly accurate description of the circumstances during negotiations as a legal duty to investigate. The argument is therefore unpersuasive.

The Engstroms next argue that they presented a genuine issue of material fact about whether the 13-year-old coupon-redemption statistics included in the confidential business

profile materially affected the value of RMA. The confidential business profile included a statement that the average rate of coupon redemption with RMA's product ranges from 8 percent to 13 percent. The Engstroms contend that they "would have seen RMA as less valuable" had they known that these data were outdated and based on only a single client profile. But a general averment is not enough to create a dispute of material fact. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (requiring the nonmoving party to respond to a summary-judgment motion with specific facts). And the Engstroms cite no evidence suggesting that the redemption-rate range was inaccurate as to the single client involved, was inconsistent with the redemption-rate range for other clients at the time, or was an inaccurate estimate of the redemption-rate range for all clients contemporaneous with the sale negotiations. Having identified no evidence showing that the data were false or misleading, the Engstroms fail to support their assertion that the data create a fact issue bearing on the usefulness or value of RMA.

The Engstroms contend that Johnson failed to disclose that RMA's profit margins were shrinking. They point to an email Johnson sent to the printer complaining about her inability to profitably process smaller coupon projects and about the profit margin on a project she completed for a large client. But they point to no evidence that RMA's profit margins generally were shrinking. Indeed, the confidential business profile shows that RMA's profits were increasing, not decreasing. The Engstroms point us to no evidence creating a genuine issue of material fact as to whether Johnson materially misrepresented RMA's profit-margin record.

The Engstroms also argue that Johnson did not inform them that RMA experienced shipping issues that caused late deliveries and damaged RMA's client relationships. But they identify no evidence showing that any tardy deliveries ever materially damaged RMA's client relationships, ever caused any client to cease using RMA's products, or ever impacted RMA's value. The Engstroms point to an email from Johnson to her coupon printer that RMA had been "put on notice" by a client in 2019 due to shipping issues. The email includes an extract from the client's response to Johnson, in which the client expressed dissatisfaction with a late delivery. The client's email stated, "Not much we can do now but this can't happen again." Johnson, not the customer, characterized the customer's response as being "put on notice," and there is no evidence of any resulting client loss or value reduction. The evidence does not reveal a fact dispute over whether RMA's shipping issues harmed customer relationships or otherwise had any significant bearing on the company's value.

The Engstroms then argue that Johnson misrepresented the amount of competition there is for RMA's business and how much advertising would be necessary to make RMA successful. But the record reflects that the Engstroms were apprised multiple times that RMA faced significant competition and needed to engage heavily in advertising to succeed. Even apart from the self-evident and obviously increasing reach of digital marketing in competition with printed coupon marketing, the appraiser's valuation and the confidential business profile elaborated on substantial digital competition. The valuation explained that the direct-mail advertising industry revenue is expected to continue to decline at a rate of 1.6% over the following five years resulting from digital advertising, and the confidential

business profile cautioned that any form of print, visual, or electronic advertising should be viewed as competition with RMA's product. The valuation also stated that Johnson has had to "warn off a few potential competitors who have attempted a 'work around' the patent to compete" with RMA's mailers. The Engstroms had ample notice that RMA faced competitors, and they identify no genuine issue of material fact as to whether Johnson materially misrepresented the amount of competition RMA faced.

The Engstroms were also informed about the amount of marketing necessary for RMA to succeed after their purchase. The confidential business profile stated that Johnson had expanded RMA by networking, conferences, mailings, referrals, and repeat business. The business profile recommended company growth opportunities, including that the new owner consider networking, joining more industry associations, marketing via direct mail, and engaging in more targeted marketing. In response to the Engstroms' specific questions about growing RMA, Johnson outlined the ways she increased her customer base, including searching out new trade organizations, attending trade shows, releasing marketing mailers to targeted areas, cold calling, following up with retailers who contacted her at various functions, contacting prior clients, and posting a video on her website. This evidence belies the Engstroms' assertion that Johnson concealed the fact that they would need to "aggressively pound the pavement." We can spot no genuine issue of material fact showing that Johnson misrepresented the amount of marketing necessary for RMA to remain profitable.

We next address the Engstroms' argument that Johnson failed to disclose that there were "specific and significant problems with RMA's key customer relationships"

materially affecting the health of RMA. They cite no evidence that RMA had any significant problems with client relationships, let alone evidence that any client ceased RMA services after the business purchase because of a problem with the RMA-client relationship. Before consummating the sale, Johnson responded to the Engstroms' inquiry about whether any clients showed signs of consistent declining business by revealing that one client had been on the schedule for the first five months of 2018 but not in 2019. She explained RMA's customer scheduling and revealed that only three customers had provided their yearly schedule. She emphasized that the clients were not contracted for ongoing services by RMA. And one of the clients who ended his business relationship with RMA testified that his decision to cease working with RMA was "based solely on marketing strategy" and did not reflect any dissatisfaction with RMA's product. No evidence suggests that any client had informed Johnson before the sale that it would cease doing business with RMA.

The Engstroms argue finally that Johnson materially misrepresented RMA's financial standing in two ways. They argue specifically that Johnson should have disclosed that she became RMA's sole owner by purchasing her partner's share of the business in 2013 for $225,000 and that Johnson provided inaccurate financial projections. Neither argument prevails. The Engstroms do not explain how Johnson's failing to detail her cofounder's 2013 share sale to Johnson renders inaccurate or incomplete the disclosed information bearing on RMA's 2019 fair market value. And the Engstroms could not have reasonably relied on Johnson's supposed revenue-and-cost projection through 2024, which anticipated that RMA's revenue could increase by three percent each year. The Engstroms

knew that the projection was offered by the broker, not Johnson, and that Johnson responded to the Engstroms' request for financial predictions by clarifying that she would provide only the financial projections for projects already on the schedule. She explained that "she just isn't comfortable forecasting." No record evidence supports the Engstroms' argument that Johnson materially misrepresented RMA's financial outlook.

In sum, the Engstroms identify no basis for us to reverse the district court's well-reasoned summary judgment decision.

Affirmed.