STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1123

Custom Communications, Inc.,
Respondent,

vs.

Tom Vega,
Appellant.

Filed April 19, 2011
Reversed
Minge, Judge

Olmsted County District Court
File No. 55-CV-08-11659

Sharon M. Horozaniecki, Morrison, Fenske & Sund, P.A., Minnetonka, Minnesota (for respondent)

Robert S. Halagan, Halagan Law Firm, Ltd., Buffalo, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

MINGE, Judge

Appellant employee challenges respondent employer's recovery of commission advances based on unjust enrichment. Because the record does not support a determination that appellant's retention of advances constituted unjust enrichment and because no alternate basis of recovery was asserted, we reverse.

FACTS

Appellant Tom Vega worked as a salesman for respondent Custom Communications, Inc. (Custom). He first worked in this capacity for a period of time during the 1990s. When he rejoined Custom in July 2002, his compensation was a base salary of $750 a month ($9,000 annually) and commissions in the amount of 22% of the profits from his sales. Vega also was eligible for a $1,750 monthly draw on future commissions. These terms are set forth in an unsigned document that specifies the method of calculating commissions, states that they are payable "at the next regular pay period after the invoicing of a job," and provides for a monthly commission draw to be applied against commissions earned. The commission schedule does not address the repayment of commission advances.

In 2003, Custom increased Vega's commission rate to 25%, while his base salary remained $9,000 annually. Custom also forgave unearned commission draws from the prior year. Vega continued to draw against his commission earnings; the amounts of the draws fluctuated based on quarterly review by Custom's CFO. From August 2003 forward, Custom tracked Vega's advanced-versus-earned commissions, which resulted in a rolling commission balance, positive if Vega's earnings exceeded his draws, and negative when his draws exceeded his earnings.

By the end of 2005, Vega's commission account was significantly overdrawn. In January 2006, Vega met with his manager and Custom's CEO and CFO to discuss a change to his pay structure. The parties agreed to more than double Vega's base salary, to $25,000 annually, and decrease his commission rate to 15%. Custom created a new

commission schedule to reflect this change in pay status. The parties dispute what was said at this meeting regarding the repayment of the accumulated draws in excess of earned commissions.

On December 20, 2006, Vega gave notice to terminate his employment with Custom, setting January 5, 2007, as his last day. Because of several large sales in progress, it was unknown at that time whether Vega's ultimate balance of draws against earned commissions would be positive or negative. Vega subsequently started employment as a media specialist for Viking Electric Supply, a competitor of Custom.

In September 2007, Custom initiated this action against Vega, asserting breach of a non-compete agreement and other related claims. Custom amended the complaint to assert an unjust-enrichment claim, seeking the recovery of advanced-but-unearned commissions. Vega then asserted a counterclaim, alleging that Custom's commission-based claims were governed by a two-year statute of limitations and that, within those two years, the commission balance was positive, reflecting a balance owed to Vega. The non-compete dispute was settled. The district court dismissed Vega's counterclaim and his statute-of-limitations defense and set the case for trial. After a bench trial, the district court found that during his employment Vega earned commissions totaling $103,464.26, but was paid commissions totaling $113,742.73, and ordered judgment in the amount of $10,278.47 for Custom.

The district court denied Vega's motion for amended findings and conclusion. Vega appeals.

D E C I S I O N

"In an appeal from judgment following a court trial, we defer to the district court's findings of fact unless clearly erroneous." *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37 (Minn. App. 2009) (citing Minn. R. Civ. P. 52.01; *Hubbard v. United Press Int'l, Inc*., 330 N.W.2d 428, 441 (Minn. 1983)). "But we do not defer to the district court's decisions on purely legal questions." *Id.* (citing *Kohn v. City of Minneapolis Fire Dep't*, 583 N.W.2d 7, 11 (Minn. App. 1998), *review denied* (Minn. Oct. 20, 1998)). We review the district court's grant of equitable relief for an abuse of discretion. *City of Cloquet v. Cloquet Sand & Gravel, Inc*., 312 Minn. 277, 279, 251 N.W.2d 642, 644 (1977).

The Minnesota courts have held that, "[w]here a salesman working on commission has a draw account against commissions, there can be no recovery against him for overdrafts received in the absence of a specific contractual obligation, or an express or implied agreement of repayment." *St. Cloud Aviation, Inc. v. Hubbell*, 356 N.W.2d 749, 751 (Minn. App. 1984) (citations omitted); *see also St. Anthony Motor Co. v. Patterson*, 175 Minn. 624, 625, 221 N.W. 719, 720 (1928) (citing same rule and adding that "[i]n the absence of either an express or implied agreement or promise to repay such excess, the employer has no remedy against the employee, even though the contract in terms provides that there shall be settlements between them monthly").

This Minnesota authority is consistent with the holdings of other state courts, which, "in the absence of evidence of intention to the contrary, . . . have treated advances on future commissions as if they were in the nature of salary, especially if the advances were made in regular amounts and the agent was required to give full attention to the

principal's business interests." *Amherst Sportswear Co., Inc. v. McManus*, 876 F.2d 1045, 1047 (1st Cir. 1989). The Connecticut Supreme Court recently summarized the bases for this rule as follows: (1) the employer usually drafts the employment agreement, and "easily may include language in the agreement obligating the employee to repay any advances that exceed commissions"; (2) the employer "enjoys superior bargaining power" and thus it is "incumbent upon the employer to make any obligation for reimbursement explicit"; and (3) "when an employee works for an employer on a commission basis, the employee and employer are engaged in a joint venture" and, if an employee is required to repay advances, "the entire risk of the joint undertaking would be placed unfairly on the employee." *Ravetto v. Triton Thalassic Techs., Inc.*, 941 A.2d 309, 325-26 (Conn. 2008).

In this case, Custom did not assert a breach-of-contract claim and the district court did not decide whether the parties had a contract for repayment of commissions. Rather, Custom elected to pursue, and the district court granted, equitable recovery under an unjust-enrichment theory. On appeal, Vega asserts that the district court erred by granting equitable relief because (1) the existence of a contract between the parties precludes equitable relief; (2) Custom did not establish the required elements of an unjust-enrichment claim; (3) Custom improperly calculated the commission balance; and (4) a two-year statute of limitations partially bars Custom's claims.

"In order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the

benefit." *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). This court has further explained that "[a]n action for unjust enrichment does not lie simply because one party benefits from the efforts of others; instead, it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully." *Id.* (citations omitted). But an unjust-enrichment action "has been extended to also apply where . . . the defendants' conduct in retaining the benefit is morally wrong." *Id.*

Custom asserts, and the district court found, that Vega's retention of the advanced-but-unearned commissions was unjust because it was morally wrong. But it is undisputed that the parties agreed to the amounts of the draws that Vega would receive. Thus, there was nothing improper or untoward in the manner in which Vega initially received the funds. We recognize that there is Minnesota caselaw that holds retention wrongful even though the initial receipt was not technically wrongful. However, in those cases there was misleading conduct from an early stage. *See Shumacher*, 627 N.W.2d at 730 (affirming unjust-enrichment recovery where parents, knowing that their son was making improvements to land that he believed he would inherit, "either encouraged [the improvements] or did nothing to discourage them"); *Anderson v. DeLisle*, 352 N.W.2d 794, 796 Minn. App. 1984) (reinstating jury award based on unjust enrichment where defendants, knowing plaintiff was likely to default on his contract for deed, "stood aside and watched [plaintiff] make extensive improvements to their property"), *review denied* (Minn. Nov. 8, 1984).

Here, the determination that it became immoral for Vega to retain the funds presupposes that Custom had a right to repayment following Vega's termination. As previously discussed, however, no contractual right to repayment has been asserted or established in this case.[1] To allow recovery on an unjust-enrichment theory upon proof of unearned commission advances, without more, would be to ignore the presumption, adopted by the Minnesota Supreme Court and a majority of other jurisdictions, that commission draws are not recoverable in the absence of an express or implied agreement to the contrary. Accordingly, we conclude that the district court abused its discretion by allowing Custom to recover under a theory of unjust enrichment.[2]

Because we conclude that the unjust-enrichment claim fails on the merits, we do not reach Vega's other arguments.

Reversed.

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[1] We recognize that Custom sued Vega for recovery of unearned commissions after his first stint as a salesman, and that conciliation court judgment resolved this claim in Custom's favor. However, the more recent employment that gave rise to this litigation was based on various contractual arrangements that did not address repayment of unearned commissions and the earlier conciliation court decision is not determinative of a contractual term or bad faith in the present case.

[2] There is evidence in the record that might have supported a finding of an oral agreement for the repayment of commissions. Custom, however, expressly elected not to pursue a contract claim, and, indeed, continued to disavow that theory of recovery through oral argument before this court. Furthermore, the district court made no finding regarding the existence of such an agreement. *See Cherne Contracting Corp. v. Marathon Petroleum Co.*, 578 F.3d 735, 740 (8th Cir. 2009) (explaining that existence and terms of an oral contract are issues of fact, generally to be decided by the fact-finder). Thus, the availability of recovery on a contract theory is not before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (limiting appellate review to issues argued to and decided by the district court); *Whitaker v. 3M Co.*, 764 N.W.2d 631, 640 n.1 (Minn. App. 2009) (explaining that "our role as an [appellate] court does not extend to making factual findings in the first instance"), *review denied* (Minn. July 22, 2009).