STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1682

Horizon Engineering Services Company,
Appellant,

vs.

Lakes Entertainment, Inc., et al.,
Respondents.

Filed June 13, 2011
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-09-21902

Mark J. Kallenbach, Minneapolis, Minnesota (for appellant)

Charles K. Maier, Brian A. Dillon, Gray, Plant, Mooty, Mooty & Bennett P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant challenges the district court's grant of summary judgment to respondents on its claims of (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment and quantum meruit; and (4) joint enterprise. Because appellant has failed to

demonstrate the existence of any genuine issues of material fact or errors of law, we affirm.

FACTS

In January 2005, the Pawnee Nation of Oklahoma, a federally recognized Indian tribe, hired respondent Lakes Entertainment, Inc. (LEI) to assist in developing, financing, and constructing a casino on Pawnee land in Chilocco, Oklahoma, and to provide consulting services for the project. The agreement was as memorialized in a gaming development consulting agreement (GDCA) between LEI and the Pawnee Chilocco Gaming Corporation, a wholly owned subsidiary of the Pawnee Nation, formed to develop Pawnee gaming facilities, including the Chilocco casino.

LEI, a publicly traded casino-management company, is a Minnesota corporation with its principal place of business in Minnesota. LEI provides services to tribes to develop or manage casinos. When a tribe hires LEI for a casino-development project, LEI forms two project-specific, limited-liability companies to provide services: a consulting company and a management company. In this case, respondent Lakes Pawnee Consulting, LLC (LPC) was the consulting company formed exclusively to provide services to the Pawnee Nation in connection with the Chilocco casino project. The consulting company's task is to advise the tribe during the developmental phase of the project and to lend money to the tribe for operational and developmental costs. The

management company was Lakes Pawnee Management, LLC (LPM).[1] LPC and LPM are Minnesota limited-liability companies.

Appellant Horizon Engineering Services Company, an Oklahoma corporation, provided civil-engineering services to the Pawnee Nation during the early stages of the Chilocco casino project. Horizon has significant experience working with tribes on various tribal endeavors, including casino-development projects. When Margo Gray-Proctor, president of Horizon, first heard about the Pawnee Nation's plans to build a casino, she reached out to at least one of the tribe's leaders before responding to the tribe's request for proposals. The Pawnee Nation introduced respondents to Horizon in the early stages of the Chilocco casino project and instructed respondents to use Horizon as a civil engineer on the project. Horizon attended early-stage project meetings on May 25-26, 2005, with respondents, members of the Pawnee Nation, and other project consultants.

Horizon did not prepare a first draft of an engineering-services contract between itself and the tribe until after starting work on the project. The first draft of the contract and all subsequent drafts identified the Pawnee Nation as the entity responsible for paying Horizon for its services. By October 2005, Horizon had completed the majority of work for the Chilocco casino project but was still negotiating its contract with the tribe.

[1] The district court dismissed LPM as a party to the case pursuant to respondents' motion and the parties' stipulation.

Several months after completing its work, Horizon submitted its first invoice to LPC on April 27, 2006. LPC notified Horizon that the tribe needed to approve the invoice before Horizon could be paid. On July 17, 2006, the Pawnee Tribal Development Corporation, a governmental subdivision of the Pawnee Nation, wired $100,000 to Horizon, paying a portion of the $294,060 due Horizon for its work.

Horizon submitted the final iteration of the engineering-services contract on July 27, 2006, to LPC for execution by the tribe. Respondents were not included as parties to the contract in its final iteration or in any of its drafts.

The relationship between the tribe and respondents began deteriorating in the following weeks, and by December 2006, the tribe had abandoned the Chilocco project entirely. As a result, respondents claim they incurred upwards of $2 million in losses, and others that worked on the project, including Horizon, have also not been paid.

Horizon sued LEI, LPC, and LPM to recover $204,535 for architectural and engineering services it provided for the Chilocco casino project claiming (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment and quantum meruit; (4) fraud; and (5) joint enterprise. Horizon has not sued the tribe to recover payment.

The parties brought cross-motions for summary judgment. After a hearing, the district court, ruling from the bench, granted respondents' motion for summary judgment on all of Horizon's claims, save the joint-enterprise claim. The district court granted Horizon's motion for summary judgment on its joint-enterprise claim. The district court then granted respondents' request for reconsideration of the joint-enterprise claim ruling. Upon review of the parties' supplemental briefs, the district court reversed its previous

decision and granted respondents' motion for summary judgment on Horizon's joint-enterprise claim as well. This appeal followed.

D E C I S I O N

Horizon challenges the district court's decision to grant summary judgment to respondents and to dismiss Horizon's claims for (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment and quantum meruit; and (4) joint enterprise. We note that Horizon brought a cross-motion for summary judgment, thereby asserting that no genuine issues of material fact existed on any of its claims. *See Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993) (stating by submitting cross-motions for summary judgment, parties represented that the material facts were not in dispute). However, on appeal, Horizon claims that summary judgment was not proper because there are genuine issues of material fact.

On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

Breach of contract

Horizon argues it had an implied contract with respondents, which respondents breached when they failed to pay Horizon for its work on the Chilocco casino project. "The agreement necessary to form a contract need not be express, but may be implied from circumstances that clearly and unequivocally indicate the intention of the parties to enter into a contract." *Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp.*, 617 N.W.2d 67, 75 (Minn. 2000); *see also Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 150 n.4 (Minn. 2001) (holding that an "implied contract is a contract in the legal sense - an actual contract, which entitles a plaintiff to legal remedies"). "To establish a breach-of-contract claim, a plaintiff must show that (1) a contract was formed; (2) the plaintiff performed any conditions precedent; and (3) the defendant breached the contract." *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). "The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Id.*

Respondents deny the existence of a contract with Horizon, implied or otherwise. Instead, respondents assert that at all times, they acted as an agent on behalf of a disclosed principal, the Pawnee Nation, and that Horizon contracted with the tribe for its work on the project. Horizon counters that the tribe was not a disclosed principal, and it believed that it was rendering services to respondents. To support this claim, Horizon argues it worked only at the direction of respondents; that respondents promised Horizon payment for services; and that respondents controlled the checkbook and wired Horizon a $100,000 payment for its work.

The general rule is that an agent is not a party to a contract entered into by the agent on behalf of a disclosed principal. *Kost v. Peterson*, 292 Minn. 46, 49, 193 N.W.2d 291, 294 (1971). In contrast, an agent who enters into an agreement on behalf of an "undisclosed" or "partially disclosed" principal is deemed to be a party to the agreement and, thus, may be held liable on the agreement. *Paynesville Farmers Union Oil Co. v. Ever Ready Oil Co.*, 379 N.W.2d 186, 188 (Minn. App. 1985), *review denied* (Minn. Mar. 14, 1986).

The first issue is whether there is a genuine fact question as to the Pawnee Nation's status as a disclosed principal to Horizon. A principal is deemed "disclosed" if the other party has notice of two facts: first, the fact "that the agent is acting for a principal," and second, "the principal's identity." *Northland Temps., Inc. v. Turpin*, 744 N.W.2d 398, 404 (Minn. App. 2008) (citing Restatement (Third) of Agency § 1.04(2) (2006)), *review denied* (Minn. Apr. 29, 2008). "A third party will be treated as having notice of an agency relationship if the third party has actual knowledge of it or reason to know of it or if the third party has been given a notification of it." Restatement (Third) of Agency § 6.01 cmt. c (2006).

A careful examination of the record shows that Horizon either knew or should have known respondents were acting on behalf of the tribe. Horizon was given notification that respondents were acting for a principal via e-mail in January 2005. Horizon president Margo Gray-Proctor received an e-mail in January 2005 from the American Indian Chamber of Commerce of Oklahoma notifying her of the public

announcement of a consulting agreement between LEI and the Pawnee Nation to develop gaming facilities on Pawnee land.

Significantly, Horizon prepared a written engineering-services contract with the Pawnee Nation. After commencing its work on the project, Horizon prepared the first draft of the contract, which identified the Pawnee Nation as the owner of the project and as the entity responsible for paying Horizon for its services. Each subsequent draft of the contract, including the final iteration executed on July 27, 2006, named the tribe as the owner and entity responsible for paying Horizon for its services. Respondents were never named as parties to the contract or designated as principals on the project.

"Absent explicit disclosure to the third party, an agent may argue that the circumstances surrounding the agent's dealings with the third party gave the third party reason to know that the agent dealt only as the principal's representative." Restatement (Third) of Agency § 6.01 cmt. c. Upon learning about the project, Gray-Proctor spoke with Roger Foster of the Pawnee Tribal Development Corporation. Foster told Gray-Proctor that a request for proposals would be issued for the project's engineering services. Horizon submitted a proposal and attended project-planning meetings on May 25-26, 2005, where members of the Pawnee Nation, including Foster, were in attendance, along with other contractors and respondents. The meeting memorandum shows that the tribe expressed its vision for the project and respondents were to work with the tribe to facilitate the project. Specifically, the memorandum states, "the Tribe representatives made clear that they are looking for an exciting and vibrant expression that brings Las Vegas to the plains," and that "[the project architect and respondents] will re-assess

direction and confer with the Tribe representatives." Gray-Proctor testified in her deposition that she understood the Chilocco casino project was for the Pawnee Nation and was being built on Pawnee land, and that the "Las Vegas on the Plains" vision was being driven by the tribe. Although Horizon took direction from respondents, it knew respondents were working on behalf of the tribe. Horizon's assertion that it took direction only from respondents is not dispositive in determining whether the tribe was a disclosed principal, for it is the usual practice to deal only with the agent in a principal-agent relationship.

Horizon also argues that it contracted with respondents independent of its contract with the Pawnee Nation because respondents promised Horizon payment for its services. The only evidence in the record Horizon cites is that respondents' representatives, Richard Bienapfl, Tim Cope, and Lyle Berman, told Horizon it would be paid for its work on the project. Yet this evidence does not establish that there was a separate contract between respondents and Horizon. A contract exists upon communication of a specific and definite offer, acceptance and consideration. *Commercial Assocs., Inc.*, 712 N.W.2d at 782. Horizon does not allege that respondents promised that LEI or LPM would pay Horizon, and nothing in the record suggests that respondents made such a promise. The record supports respondents' assertion that these statements were made by respondents as agents of the disclosed principal, the Pawnee Nation, and were not an independent promise by respondents to Horizon. Consequently, no independent contract was formed as a matter of law.

Finally, Horizon's claim that the tribe was not a disclosed principal because respondents controlled the checkbook and wired Horizon $100,000 for payment is without merit. While respondents lent the tribe money to develop the project, the GDCA prohibited respondents from advancing funds for costs unless first getting approval from the development committee, which consisted of three Pawnee representatives and two representatives from LEI. And, on July 17, 2006, the Pawnee Tribal Development Corporation – not respondents – wired $100,000 to Horizon for its work. Respondents merely facilitated this transaction on behalf of the tribe. These undisputed actions not only fail to create a fact issue as to the existence of an implied contract between Horizon and respondents but also further support respondents' contention they acted as an agent of the tribe.

There is no genuine issue of material fact as to whether Horizon knew or should have known that respondents were acting as an agent of a principal. Further, Horizon knew the principal's identity – the Pawnee Nation. Because the tribe was a disclosed principal, respondents are not liable for contracts they entered into with Horizon on behalf of the tribe. There is also no evidence to support Horizon's claim that it had an implied contract with respondents, independent of its contract with the tribe. Accordingly, the district court did not err when it granted respondents' motion for summary judgment and denied Horizon's summary-judgment motion on Horizon's breach-of-contract claim.

Exceeding authority

Alternatively, Horizon argues that if respondents acted as agents of the tribe, respondents exceeded their authority in hiring Horizon and are thereby liable to Horizon. Under the GDCA between LEI and the Pawnee Nation, respondents needed the approval of the development committee before hiring a design professional to work on the Chilocco casino project. Horizon claims the development committee did not approve or ratify the hiring of Horizon and, therefore, respondents exceeded their authority under the GDCA when they hired Horizon, making respondents liable to Horizon for payment for its services.

In opposing summary judgment, "general assertions" are not enough to create a genuine issue of material fact. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). "In order to successfully oppose summary judgment, appellant must extract specific, admissible facts from the voluminous record and particularize them for the trial judge." *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752, 754 (Minn. App. 1988) (emphasis omitted), *review denied* (Minn. Mar. 30, 1988).

Horizon has not pointed to specific facts that show the tribe failed to approve its hiring by respondents. Respondents maintain they had approval to hire Horizon, evidenced by the fact the tribe introduced Horizon to respondents and told respondents the Pawnee Nation approved of and wanted to use Horizon as a civil engineer on the project. Respondents also note the tribe was involved in early-stage project meetings with Horizon, demonstrating the tribe's approval of the hiring of Horizon.

There is no evidence to support Horizon's claim that the tribe did not approve of respondents hiring Horizon, thereby exceeding the authority accorded respondents under the GDCA. Because there is no genuine issue of material fact on this question, the district court did not err when it granted respondents' motion for summary judgment and denied Horizon's motion for summary judgment on Horizon's breach-of-contract claim.

Promissory estoppel

Next, Horizon claims the district court erred when it granted respondents' motion for summary judgment on Horizon's promissory-estoppel claim. In order to survive a motion for summary judgment, a claim for promissory estoppel must be supported by alleging (1) a clear and definite promise; (2) which the promisor expects to induce definite action by the promissee and does induce such action, to the promisee's detriment; and (3) enforcement of the promise is needed to prevent an injustice. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992).

Horizon alleges respondents' representatives made numerous promises that Horizon would get paid for its work on the Chilocco project and that Horizon relied on these statements and believed respondents were making an independent promise to pay Horizon for its work. Promissory estoppel requires that the promise be one "that might reasonably induce the promisee's action or inaction." *Faimon v. Winona State Univ.*, 540 N.W.2d 879, 882 (Minn. App. 1995), *review denied* (Minn. Feb. 9, 1996). Horizon could not have completed the work in reliance on respondents' statements because the alleged statements were made at or after a June 2006 meeting, months after Horizon had completed work on the project. Horizon submitted an invoice for all of its work on April

27, 2006. There is no evidence, and Horizon does not allege, that respondents made similar statements before June 2006, nor does Horizon claim that it completed any additional work following respondents' statements in June 2006.

Respondents' statements could not have induced Horizon to act, because the statements were made after Horizon completed and billed for its work on the project. Because there are no genuine issues of material fact respecting Horizon's promissory-estoppel claim, the district court did not err when it granted respondents' summary-judgment motion and denied Horizon's summary-judgment motion.

Unjust enrichment and quantum meruit

Horizon argues that respondents were unjustly enriched because Horizon provided engineering services for the Chilocco casino project and respondents never paid Horizon for the work. Respondents argue they did not receive a benefit from Horizon's work on the project, and that only the Pawnee Nation benefitted from Horizon's services.

To establish an unjust-enrichment claim, a plaintiff must show that: (1) a party has knowingly received something of value; (2) the party is not entitled to the benefit; and (3) it would be unjust for the party to retain it. *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn. App. 1992). The district court granted respondents' summary-judgment motion and dismissed Horizon's unjust-enrichment claim, finding no facts in the record to support Horizon's bald assertion that respondents benefitted from Horizon's work on the Chilocco casino project.

According to Horizon, respondents were enriched by Horizon's work because they received the requested engineering services for the Chilocco project and respondents

would have had to hire another engineering company to do the work if not for Horizon. This argument is flawed because it does not demonstrate how respondents received any benefit from Horizon's work. The record shows, and Horizon acknowledged, that the Chilocco casino was being built to benefit the tribe, not respondents.

To support their claim of absence of enrichment, respondents note that the tribe's abandonment of the project also significantly harmed them, costing them "millions of dollars in losses." Horizon does not provide any evidence that demonstrates respondents benefitted from Horizon's work on the project.

Horizon's general assertions that respondents received a benefit from its work are not enough to create a genuine issue of material fact. *See Nicollet Restoration, Inc.*, 533 N.W.2d at 848. To successfully oppose respondents' motion for summary judgment, Horizon must extract specific, admissible facts from the record and particularize them. *See Kletschka*, 417 N.W.2d at 754. Horizon has failed to do so.

Horizon does not have a right to recover payment for its work on the project in quantum meruit because quantum meruit is a measure of remedy and does not arise absent a showing of unjust enrichment. *See Stemmer v. Estate of Sarazin*, 362 N.W.2d 406, 408 (Minn. App. 1985).

Because we find no evidence in the record of any benefit to respondents from Horizon's work on the Chilocco casino project, the district court did not err by granting respondents' motion for summary judgment on Horizon's claims of unjust enrichment and quantum meruit and denying Horizon's summary-judgment motion for the same.

Joint enterprise

Finally, Horizon argues that respondents should be responsible for the Pawnee Nation's wrongful conduct because there was a joint enterprise between respondents and the tribe. When a dispute arises in the context of a business transaction, Minnesota courts apply the law of joint ventures. *See Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984).

Under Minnesota law, an enterprise does not constitute a joint venture unless each of the following four elements is present: "(1) contribution by all parties, (2) joint proprietorship and control, (3) sharing of profits but not necessarily of losses, and (4) a contract." *Delgado v. Lohmar*, 289 N.W.2d 479, 482 n.2 (Minn. 1979) (citing *Treichel v. Adams*, 280 Minn. 132, 158 N.W.2d 236 (1968); *Rehnberg v. Minn. Homes, Inc.*, 236 Minn. 230, 52 N.W.2d 454 (1952)).

Originally, the district court found there were genuine issues of material fact as to whether respondents had a legal right to control casino development and denied respondents' motion for summary judgment. However, on reconsideration, the district court found that a joint venture did not exist between respondents and the Pawnee Nation because respondents did not and could not hold a proprietary interest in the Chilocco casino. Finding respondents' lack of proprietary interest dispositive, the district court did not analyze the other elements of a joint venture.

On appeal, Horizon argues there was a joint venture because respondents and the tribe had joint proprietorship and control over the Chilocco casino project. Horizon asks this court to broaden the definition of "proprietary interest." It notes *Rehnberg* does not define the term and cites to a number of cases that do. But none of the cases Horizon

cites are binding on this court. Horizon concedes that the tribe was the sole owner of the Chilocco casino project, but claims respondents have a proprietary interest in the project because "absent [respondents'] skill and expertise in the design, development and operation of the casino, the project was certain to fail." Yet this only articulates respondents' significance to the success of the project, not their proprietary interest in it.

Horizon incorrectly states that the GDCA does not contain "any language which contemplates that the relationship between [respondents] and the Pawnee Nation is not to be construed as a joint venture." To the contrary, the GDCA explicitly provides that "[a]t all times, Pawnee shall have the sole proprietary interest in and management responsibility for the conduct of all Gaming Operations." This language plainly disallows a necessary element of a joint venture in the relationship between respondents and the tribe.

Horizon also fails to address the fact that federal law prohibits private parties, such as respondents, from holding an ownership interest in a tribal casino. 25 U.S.C. § 2710(b)(2)(A) (2006) ("The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II[2] gaming on the Indian lands . . . if [it] provides . . . the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."). The district court reasoned that because federal law prohibited respondents from holding a proprietary interest in the Chilocco casino, a joint venture could not exist between respondents and the tribe.

[2] The GDCA states the Pawnee Nation was developing Class II and Class III gaming facilities.

Horizon also attempts to support its claim that respondents had control over the Chilocco casino project by pointing to the GDCA, which provided for "mutual decision-making." Indeed, the GDCA gave decision-making power to both the tribe and respondents. But Horizon fails to acknowledge that mutual decision-making is a part of any agency relationship. Respondents assert that ultimately the tribe was in control and the power to act and make decisions on behalf of the tribe is consistent with the principal-agent relationship. Also, the GDCA states that while the tribe and respondents will collaborate, "it shall be within the sole discretion of Pawnee to determine whether or not to act upon or implement the technical assistance, consultation or advice provided by [respondents]," and that "the decision to adopt, approve or implement any proposal, suggestion or recommendation made by [respondents] in connection with its operations consulting services shall rest exclusively with Pawnee." So, although respondents were hired by the tribe for their expertise to consult with the tribe, the GDCA left the ultimate decision to act on any of respondents' suggestions with the tribe.

Furthermore, for a joint enterprise to exist, "there must be an express or implied agreement for the sharing of profits." *Rehnberg*, 236 Minn. at 235, 52 N.W.2d at 457. Neither the GDCA nor any other agreement in the record provided for profit-sharing. Respondents were compensated for their services by a fixed fee of 3% of project costs in addition to $250,000 monthly payments.

Horizon's argument that respondents would receive a share of profits from the casino pursuant to a management agreement with the tribe fails. The agreement was never approved by the National Indian Gaming Commission (NIGC). The NIGC's

approval is needed for profit-sharing with a private party. 25 U.S.C. § 2711 (2006). The argument also fails because the agreement was between LPM and the tribe, and LPM is no longer a party to this case. Furthermore, the agreement would only become relevant once the Chilocco casino was built, which it never was because the tribe abandoned the project.

Because federal law and the GDCA prohibited respondents from holding an ownership interest in the Chilocco casino, and because there is no evidence of an expressed or implied agreement for the sharing of profits, no joint enterprise existed between respondents and the tribe. For these reasons, the district court did not err in granting respondents' summary-judgment motion and denying Horizon's motion for summary judgment on Horizon's joint-enterprise claim.

Affirmed.