STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1254

MAS Products, Inc., f/k/a MAS Racing Products, Inc.,
Respondent,

vs.

MAS Acquisition, Inc., et al.,
Appellants.

Filed February 27, 2012
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-10-21672

Court J. Anderson, Henson & Efron, P.A., Minneapolis, Minnesota (for respondent)

Robb L. Olson, Geck, Duea & Olson, PLLC, White Bear Lake, Minnesota (for appellants)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellants challenge the district court's grant of summary judgment in favor of respondent on respondent's breach-of-contract claim and its dismissal of appellants' counterclaims with prejudice. The initial breach-of-contract claim arose when appellants failed to pay on a promissory note for the purchase of the business assets of respondent company. Appellants denied the claim and asserted counterclaims for breach of contract/indemnification, negligent and intentional misrepresentations, and breach of warranty. Appellants challenge the district court's determination that: (1) there were no genuine issues of material fact as to appellants' breach-of-contract counterclaim; (2) the business sale agreement contained a provision requiring all modifications be made in writing; (3) the statute of frauds, Minn. Stat. § 513.01 (2006), bars appellants' claim of an oral modification of the business sale agreement; and (4) the fraudulent-misrepresentation and breach-of-warranty counterclaims are not distinct causes of action, separate and apart from the breach-of-contract counterclaim. Because there are no material facts in dispute and the district court did not err in the application of the law, we affirm.

FACTS

Richard Kohn formed respondent company MAS Racing Products, Inc., now MAS Products, Inc., (Racing Products) approximately 25 years ago. Respondent sold automotive performance parts through its retail store and mail-order business. In the summer of 2007, appellants Tom Elbert and Mike Abel, along with Tom Giebel (who is

not a party to this action), joined together to form appellant MAS Acquisition, Inc. (MAS), to purchase respondent company.

Before the sale, Elbert and Giebel met with Kohn to discuss his business. Kohn stated that computerization of inventory records was a weak point in the business. Appellants were interested in buying respondent company because they hoped to increase sales, in part through computerization of inventory records with a goal of turning inventory quarterly. To better understand the business, appellants visited the retail store and warehouse where the inventory was stored. Prior to the purchase of assets, Kohn would not show appellants actual inventory records or inventory lists, claiming they were confidential. Instead, Kohn showed appellants the respondent company's tax returns, provided a rough estimate of inventory, and gave them an example of inventory records in a spreadsheet format. Kohn estimated that the inventory was worth $410,000 and that the other assets of the business were worth $77,500, which is what the value of the inventory and assets in the purchase price were based upon.

On August 31, 2007, respondent entered into a Business Sale Agreement (BSA) with appellants. In the BSA, Kohn, the sole owner of respondent company agreed to sell his business assets to appellants in return for a total purchase price of $490,000. The purchase price of $490,000 was based upon respondent's cost of inventory ($410,000), equipment ($77,500), and a non-compete agreement ($2,500). The purchase price included $10,000 in earnest money, a $320,000 down payment due at closing, and a $160,000 promissory note. The promissory note was personally guaranteed by appellant owners of MAS.

The BSA contained a section entitled, "Inventory Adjustment," which permitted the parties to increase or decrease the $160,000 Subordinated Promissory Note (SPN) to reflect the actual value of the inventory purchased. This "Inventory Adjustment" section of the BSA is the focus of the dispute between the parties. The "Inventory Adjustment" laid out a procedure by which the promissory note could be modified. Under the BSA, to modify the promissory note, the following steps were required:

1. Within two days of closing, respondent and appellants were to jointly conduct a physical count of the inventory.

2. Following the inventory count, appellants were to determine which items and quantities of inventory were obsolete. Obsolete inventory was defined as "any quantity of an item included in the inventory over and above the quantity of such item sold by the Business during the twelve-month period prior to the closing date . . . ."

3. Inventory that was not obsolete was to be accorded a value equal to respondent's actual cost incurred in acquiring the inventory. Obsolete inventory was not to be accorded any value. However, if the obsolete inventory were sold within the twelve months following closing, appellant was to pay respondent the actual cost respondent incurred in acquiring that inventory.

4. The SPN would then be modified based on the agreed-upon value of the inventory. If the value of the inventory was less than $410,000, the SPN would be reduced by the amount the inventory was valued at below $410,000, and if the value was greater than $410,000, the SPN could be increased by the amount the inventory exceeded $410,000. However, in no event was the price to increase by more than $20,000.

5. If the parties were unable to agree on the physical inventory count within 30 days of closing whether an item was "obsolete," or respondent's cost in acquiring the inventory, the parties agreed to retain an independent appraiser.

The SPN provided that appellants would make monthly payments of $1,857.74, beginning October 1, 2007. In the event of a default, respondent could declare the note immediately due and payable.

Upon closing the asset sale, the parties met to perform the inventory count called for in the "Inventory Adjustment." The parties did not complete the inventory count in two days, as contemplated in the BSA. Rather, the count took approximately five weeks to complete. Following the inventory count, the parties met to try to determine which inventory was obsolete and to value the inventory to determine if the SPN should be modified. After these meetings, appellants allowed respondent to sell $10,000 worth of inventory on eBay and keep the proceeds. The parties disagree on the results of the inventory count and what they decided regarding modification of the SPN.

Kohn stated that the parties agreed that the value of the inventory was $420,000, and that, because the BSA valued the inventory at $410,000, respondent was entitled to receive an additional $10,000, which appellants paid by allowing respondent to sell $10,000 worth of inventory. This arrangement allowed the parties to keep the amount owed under the SPN at $160,000. Appellants dispute this claim, arguing that Elbert arrived at a much lower value for the inventory less obsolescence—a value of approximately $320,000. Appellants claim that they allowed respondent to sell inventory and keep the $10,000 in order to appease Kohn, and that the $10,000 had nothing to do with the inventory valuation. Appellants further claim that they prepared a final list of the physical count of inventory on an Excel spreadsheet. However, the computer that the spreadsheet was prepared on was sold at auction in July 2009, and the physical copy has

disappeared. Appellants allege that Kohn took the spreadsheet. Appellants prepared a list of the items they believed constituted obsolete inventory, but those items were also sold at auction in July 2009, and no record was kept of the sale price.

Appellants made their $1,857.14 monthly payments due on the $160,000 SPN from December 2007 through December 2008 and retroactively paid for the months of October and November 2007. Appellants stopped making payment on the SPN in January 2009. In September 2009, respondent filed suit, alleging claims of breach of contract, quantum meruit, and unjust enrichment. Appellants denied the claims and asserted counterclaims for breach of contract/indemnification, negligent and intentional misrepresentations, and breach of warranty. Respondent filed a motion for summary judgment, seeking an award of summary judgment on its breach-of-contract claim and dismissal of appellants' counterclaims. The court granted summary judgment in favor of respondent and dismissed appellants' counterclaims with prejudice. In granting respondent's motion for summary judgment, the district court focused on appellants' counterclaims, finding no genuine issues of material fact. This appeal follows.

D E C I S I O N

A motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. On appeal from an award of summary judgment, a reviewing court asks two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of

the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). An appellate court reviews both questions de novo, viewing the evidence in the light most favorable to the party against whom judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002); *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). An award of summary judgment will be affirmed if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

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).

Breach-of-Contract Counterclaim

Appellants argue that the district court erred in determining that there were no genuine issues of material fact relating to the appellants' breach-of-contract counterclaim. Count One of appellants' counterclaim alleged that, in connection with the BSA, Kohn "represented and warranted that the inventory records and financial disclosures provided to the [appellants] were true and correct." Appellants claimed that respondent breached the BSA by providing "inventory records and financial disclosures . . . [that] were not true and correct." Appellants did not cite to a specific provision of the contract that the

respondent was alleged to have violated, so the district court concluded that appellants were referring to section 3(d) of the agreement, which states:

> Seller has furnished Buyer with financial data reflecting the operations of the Business. All financial disclosures fairly present the financial position of Seller and the results of its operations. Seller warrants that all information provided to Buyer, *including information with respect to inventories, revenues and costs, is true and accurate*. Seller acknowledges that Buyer has relied upon data provided by Seller in order to formulate its purchase price.

(Emphasis added). The district court concluded that section 3(d) requires accuracy, not completeness, and that all of appellants' allegations related to the completeness of the records. Because there was a lack of evidence that the records provided were inaccurate, the district court concluded that appellants failed to raise a genuine issue of material fact as to whether respondent breached section 3(d) of the agreement. On appeal, appellants argue that there are material fact issues relating to the inventory value and alleged misrepresentations made by Kohn regarding the inventory value and asset ownership that preclude summary judgment.

To prevail on a breach-of-contract claim, a plaintiff must show (1) the formation of a contract; (2) the plaintiff's performance of any conditions precedent to its right to demand payment from the defendant; and (3) the defendant's breach of contract. *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). A party asserting affirmative defenses to a contract has the burden of proving those affirmative defenses. *See MacRae v. Group*

Health Plan, Inc., 753 N.W.2d 711, 716 (Minn. 2008) (stating that a party asserting an affirmative defense has the burden of proving the defense's elements).

First, appellants argue that there is a material fact issue as to the value of inventory less obsolescence. The purchase price in the BSA was based in part on an estimated inventory value of $410,000, but the amount due on the SPN was subject to modification based on the actual value of the inventory as determined by a joint inventory review. After completing the inventory review in October 2007, the parties reached different conclusions as to how much the inventory was worth. Kohn valued the inventory at approximately $460,000, while appellants valued the inventory at approximately $320,000. Appellants claim that this difference in inventory valuations creates a fact issue that must be resolved by a trier of fact and that the district court thus improperly granted summary judgment on the breach-of-contract issue.

Appellants' breach-of-contract counterclaim alleges only that the "inventory records and financial disclosures provided [to them] were not true and correct." However, there is no evidence in the record that the inventory records and financial disclosures regarding the inventory valuations provided to appellants before the sale were false. Appellant Elbert's affidavit stated only that "Kohn provided a range of the value of inventory, which he said fluctuated over the course of the year, from a lower amount in the winter to a higher value during the summer months." Moreover, Giebel admitted that he knew the estimated value of Racing Products' inventory was merely a guess and that Kohn did not know his actual inventory levels because he did not have a system in place to track inventory. Specifically, Giebel testified:

ATTORNEY: Did Mr. Kohn ever tell you which method by which he used to value inventory of $410,000?
GIEBEL: PFA.
ATTORNEY: PFA meaning?
GIEBEL: Plucked from the air.
ATTORNEY: Mr. Kohn told you that?
GIEBEL: That was my observation.

Not only have appellants failed to cite to a specific, material fact in the record showing that respondent breached the BSA contract by providing appellants with an inaccurate inventory valuation, the record in fact reflects that appellants were aware that the inventory valuation provided by respondent was merely a guess. In fact, one of the main reasons appellants desired to purchase respondent's company was to improve the inventory process. Therefore, their breach-of-contract counterclaim on the issue of inventory value was properly dismissed.

Appellants also allege that respondent breached the BSA by misrepresenting facts relating to inventory records and ownership of parts. Section 3(f) of the BSA provides:

> None of the representations or warranties made by Seller contains or will contain any untrue statement of a material fact or omits or will omit any material fact, the omission of which would be misleading.

Specifically, appellants allege the following misrepresentations of fact by respondent: (1) Kohn stated that he conducted an annual inventory review of the business; (2) Kohn led appellants to believe that Racing Products maintained true, accurate, and complete inventory records in order to prepare tax returns and run the business; (3) Kohn stated that Racing Products owned all of the molds and jigs used to produce parts in Racing Products' catalog.

Appellants argue that a material-fact question exists as to whether Kohn's statement that he conducted an annual inventory review of the business, when they allege that he did not, constituted a violation of the BSA. They argue that they relied on this representation in deciding to purchase respondent's business and in calculating the purchase price, and that without an annual inventory from the prior year it was impossible to perform the two-day inventory count called for in the "Inventory Adjustment," which was Exhibit C to the BSA.

In his affidavit, appellant Elbert stated, "Kohn also stated prior to the sale that he had a good inventory system, and conducted an annual inventory of the business." The district court correctly found that Kohn's characterization of his inventory system as "good" was merely an opinion. "[N]either opinions nor statements that are 'general and indefinite' are representations of fact." *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000).

As to appellants' claim that Kohn misrepresented that he conducted an annual inventory, the record reflects that appellants are in fact, once again, challenging the accuracy of respondent's annual inventory. The record reflects that Kohn did in fact conduct annual inventories. Kohn stated that he conducted annual inventories and that he kept an inventory of products in both the showroom and the warehouse. When asked how he calculated his inventory value for purposes of the sale agreement, Kohn stated, "From the previous year's inventory, and then sales and purchases added on and taken off of that number."

Rather than arguing that respondent did not keep an annual inventory, it appears that appellants are arguing that the "annual inventories" kept by Kohn did not meet their expectations and were not as accurate as they would have liked. In fact, in their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, they discussed Kohn's annual inventory and the sample inventory record he provided, and stated, "Racing Products simply did not have adequate records to perform the inventory analysis set forth in Exhibit C to the Business Sale Agreement." Because there is no evidence in the record that Kohn's statement that he conducted an annual inventory is inaccurate, and only evidence that his annual inventories did not meet appellants' expectations, appellants have failed to show that there was a misrepresentation that breached the agreement.

Next, appellants argue that Kohn led them to believe that respondent maintained true, accurate, and complete inventory records in order to prepare tax returns and generally run the business. They argue that, prior to the asset purchase, Kohn would not show them the actual inventory records, but instead provided a sample record and indicated that the remainder of the inventory records were similar to the example. Appellants argue that they relied upon this representation in purchasing the respondent company.

As discussed above, appellants have failed to demonstrate that any of the financial records provided by respondent were inaccurate. Moreover, appellants admitted multiple times in deposition that they knew that respondent's inventory accounting was "a disaster" and that concern over the status of the inventory and inventory accounting was

the reason why the inventory count adjustment provision was included in the contract. Specifically, when asked about viewing the inventory pre-sale, Giebel testified, "there was no inventory taking. There was no cycle counting. . . . there was no method of accounting for inventory." Because appellants have failed to cite a specific financial disclosure that was inaccurate and have, in fact, demonstrated that they knew the inventory and financial records to be inaccurate and incomplete, they have failed to raise a genuine issue of material fact on their breach-of-contract claim.

Finally, with regard to their breach-of-contract counterclaim, appellants argue that there is a material fact issue as to whether appellants received ownership of all of the molds that Kohn represented respondent owned. They argue that, prior to the asset sale, Kohn stated that respondent owned all of the molds and jigs used to produce parts in the catalog. They claim that, after the sale, appellant Elbert visited a fiberglass vendor and was informed that the vendor, not respondent, owned many of the molds that were used to produce parts from the catalog.

The BSA provided that respondent was selling certain molds to appellants, but did not specify the exact type of molds and the parties did not discuss which molds were included. It is undisputed that after the sale, respondent did in fact transfer all of the molds it owned to appellants. The molds transferred were listed in Exhibit A. Giebel admitted that he did not "know whether or not the catalog contained more or less molds than those detailed in Exhibit A." Moreover, the signatory to a contract cannot prove reliance on a pre-contractual representation that is inconsistent with the terms of the contract. *See, e.g.*, *Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404,

412 (Minn. 1980). The misrepresentation claim is inconsistent with the terms of the contract because appellants seek molds above and beyond the number specified in the BSA and cannot specify any mold that they did not receive. Because appellants could not reasonably rely on any pre-contractual representations relating to the type and quantity of molds purchased, and because appellants have failed to prove that they did not receive the molds used to produce catalog parts, they have failed to prove a breach of contract.

Oral Modification

Appellants initially argued that the district court erroneously found that there was a contract provision in the sales agreement that required all modifications to be in writing. However, in their reply brief, appellants acknowledged that the sales agreement did, in fact, contain a provision stating that the agreement could only be modified in writing. Specifically, Section 10 of the BSA states: "This Agreement may be amended only in a writing signed by both parties." Appellants argue that a written agreement can be modified by oral agreement even if the contract states that it can be modified only in writing. They contend that the parties agreed to an oral modification of the BSA as to the manner used to identify obsolete inventory and value the inventory. According to appellants, the parties orally agreed to a year-long count mechanism in lieu of the procedure relating to the inventory adjustment outlined in the BSA.

This court has held that "[t]he general common law rule is that a written contract can be varied or rescinded by oral agreement of the parties, even if the contract provides that it shall not be orally varied or rescinded." *Larson v. Hill's Heating and Refrig. of Bemidji, Inc.*, 400 N.W.2d 777, 781 (Minn. App. 1987) (holding oral modification

agreement effective despite the contract's provision against oral modification), *review denied* (Minn. Apr. 17, 1987). Moreover, "[a]lthough the parol evidence rule excludes evidence of contemporaneous and prior agreements varying the terms of a written contract, it does not exclude evidence of subsequent oral modifications of a contract." *LaPanta v. Heidelberger*, 392 N.W.2d 254, 258-59 (Minn. App. 1986). In light of this authority, an oral agreement between the parties to modify the BSA would be effective despite the contract's provision against oral modification—so long as appellants can prove that the parties did in fact enter into an oral modification of the agreement and that the oral modification did not violate the statute of frauds.

"This court respects written contracts and subjects allegations of an inconsistent oral contract to a rigorous examination." *Bolander v. Bolander*, 703 N.W.2d 529, 541-42 (Minn. App. 2005), *review dismissed* (Minn. Nov. 15, 2005). The party asserting that there has been an enforceable oral modification of the terms of a written contract bears the burden of proving the modification of the written contract by clear and convincing evidence. *Id.* at 541. The burden is not met by a mere preponderance of the evidence. *Id.* The question of whether the parties entered into an oral modification of the contract is a question of fact. *See Johnson v. Quaal*, 250 Minn. 154, 158, 83 N.W.2d 796, 799 (1957).

Appellants claim that the parties reached an oral agreement to sell inventory for a year, declare all inventory not sold within a year as "obsolete," and then revalue the inventory and the payments due under the SPN based on the "obsolete" inventory. Appellants described this modification as a "year-long count mechanism" in which the

parties would recount the inventory and assess the inventory value after one year had passed.

Based on the record, appellants have failed to meet their burden of establishing a genuine fact issue as to whether there was an oral modification of the terms of the written contract. Appellants allege that after purchasing the business assets and conducting the inventory evaluation, they believed that respondent's inventory was significantly overvalued. However, despite this belief, after the parties completed the inventory count, appellants admit that they allowed respondent to sell $10,000 worth of inventory and keep the proceeds. The record reveals that they never demanded a formal independent appraisal, the only remedy provided for in the BSA, and they continued to make their monthly payments under the SPN for almost a full year after the count. Moreover, the appellants' own accounting reveals that they never wrote off or wrote down inventory for tax reporting purposes. Thus, the record demonstrates that there is no evidence, let alone clear and convincing evidence, that the parties had entered into an oral modification of the written contract. Because there is no evidence of an oral modification, we decline to address the issue of whether the oral agreement would have been barred by the statute of frauds.

Misrepresentation and Breach-of-Warranty Counterclaims

Appellants challenge the district court's dismissal of their fraudulent misrepresentation and breach-of-warranty counterclaims. The district court found that the fraudulent-misrepresentation and breach-of-warranty counterclaims did not constitute distinct causes of action separate and apart from the breach-of-contract counterclaim.

In a well-written opinion, the district court concluded that, because under Minnesota law a breach-of-contract claim cannot be converted into a tort claim, appellants' misrepresentation counterclaims failed. Section 3(f) of the BSA provides:

> None of the representations or warranties made by Seller contains or will contain any untrue statement of a material fact or omits or will omit any material fact, the omission of which would be misleading.

In their Answer and Counter-Claim, appellants identified the following misrepresentations: (1) respondent represented that the inventory records were accurate; and (2) respondent represented that $77,500 worth of assets would be transferred. These misrepresentation claims were premised on representations that are part of the BSA. Specifically, Section 3(d) of the agreement contains the representation that the inventory records are accurate and Section 2(c) contains the representation that $77,500 worth of equipment would be transferred. Since the alleged misrepresentations are part of the agreement, the district court did not err when it concluded that "the misrepresentation claims fail based on the rule that a breach of contract claim cannot be converted into a tort claim."

"[A] party is not entitled to recover tort damages for a breach of contract, absent an exceptional case where the breach of contract constitutes or is accompanied by an independent tort." *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Feb. 19, 1998). However, this court has held that a party may recover for misrepresentation and breach of contract if "there is a breach of duty which is distinct from the breach of contract." *Hanks v.*

Hubbard Broad., Inc., 493 N.W.2d 302, 308 (Minn. App. 1992). "The test is whether a relationship would exist which would give rise to the legal duty without enforcement of the contract promise itself." *Id.* Appellants argue that respondent owed them a legal duty separate and apart from the contractual agreement. However, there would be no relationship between the parties but for the contract for the sale of the business. Moreover, the parties here negotiated the terms of the contract at arm's length. *See Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App. 2000) (stating that, where adversarial parties negotiate a contract at arm's length, there is no duty imposed for misrepresentation). Thus, appellants have failed to establish that they were owed a duty distinct from the duties that arose out of the contract and the district court did not err in dismissing their misrepresentation counterclaim.

Appellants also claim that Kohn made express warranties pertaining to respondent's record keeping and ownership of jigs and molds. They allege that Kohn breached those warranties by failing to provide inventory records in spreadsheet form as he stated that he would, and by claiming that he owned all of the jigs and molds used to make the catalog parts, when he did not own them. The district court found that the breach-of-warranty claim failed because it had no basis apart from the allegations underlying the appellants' breach-of-contract and misrepresentation claims.

A claim for breach of warranty requires a plaintiff to show (1) the existence of a warranty; (2) breach of the warranty; and (3) a causal link between the breach and the alleged harm. *Peterson v. Bendix Home Sys.*, 318 N.W.2d 50, 52-53 (Minn. 1982). An express warranty is created when a seller makes "[a]ny affirmation of fact or promise . . .

to the buyer which relates to the goods and becomes part of the basis of the bargain . . . ." Minn. Stat. § 336.2-313(1)(a) (2006). Appellants claim that Kohn made express warranties to them pertaining to respondent's record keeping and ownership of jigs and molds. The district court did not err when it concluded that these breach-of-warranty claims rely on the same claims and underlying facts as the breach-of-contract and misrepresentation claims, discussed above. Because the allegations underlying the breach-of-warranty claim have already been addressed and found to be without merit, there are no genuine issues of material fact precluding summary judgment.

Affirmed.