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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-51

The Talus Group, Inc.,
Appellant,

vs.

Jared Ostrander, et al.,
Respondents.

Filed September 12, 2011
Reversed and remanded
Peterson, Judge
Dissenting, Minge, Judge

Hennepin County District Court
File No. 27-CV-10-5297

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Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Minge, Judge.

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

PETERSON, Judge

Appellant challenges the district court's dismissal of its claims against two former employees and their current employer, asserting that the district court erred by determining that (1) the former employees' noncompete agreements were void as against

public policy because they were inconsistent with a federal regulation and an executive order and (2) appellant did not allege facts sufficient to support its tortious-interference-with-contract and breach-of-loyalty claims. We reverse and remand.

FACTS

In May 2007, appellant The Talus Group, Inc., entered into a contract with the United States Fish and Wildlife Service (USFWS), under which Talus agreed to provide information-technology services to USFWS from October 2007 through September 2008. The contract was extended through September 2009. The contract terms included a federal acquisition regulation continuity-of-services clause (the FAR clause), which states:

> (a) The Contractor recognizes that the services under this contract are vital to the Government and must be continued without interruption and that, upon contract expiration, a successor, either the Government or another contractor, may continue them. The Contractor agrees to –
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> (1) Furnish phase-in training; and
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> (2) Exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.
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> . . . .
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> (c) The Contractor shall allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services required by this contract. The Contractor also shall disclose necessary personnel records and allow the successor to conduct on-site interviews with those employees. If selected employees are agreeable to the change, the Contractor shall release them at a mutually agreeable date and negotiate transfer of their earned fringe benefits to the successor.

In September 2007, Talus entered into employment contracts with respondents John Franxman and Jared Ostrander. The employment contracts provided that Franxman and Ostrander would not work for a Talus competitor or any entity that was a Talus customer during their employment with Talus for one year after termination of their employment. Throughout their employment with Talus, Franxman and Ostrander performed consulting services for USFWS.

On September 14, 2009, respondent Topologe, LLC, entered into a contract with USFWS, under which Topologe agreed to provide information-technology services to USFWS from October 1, 2009, through September 30, 2010. On September 22, 2009, USFWS notified Talus that it was not going to renew Talus's contract, and, shortly after that, Talus informed Franxman and Ostrander that they should update their resumes so that Talus could place them with another customer and encouraged them to apply for unemployment benefits in case Talus could not immediately place them. Talus also informed Franxman that he had accumulated ten days of paid personal leave and that Talus would continue to pay and employ him for ten days after its contract with USFWS ended. On October 1, 2009, Franxman and Ostrander began working for Topologe performing services for USFWS.

Talus brought this action alleging claims for breach of contract and breach of the duty of loyalty against Franxman and Ostrander and tortious interference with contract against Topologe. Topologe removed the case to federal district court, but the federal court remanded the case to the state court due to a lack of complete diversity. *The Talus Group, Inc. v. Ostrander*, 2010 WL 2104573 (D. Minn. 2010). In a footnote in its brief,

Talus states that the federal court rejected respondents' claim that Talus's "claim lacked a reasonable basis." The issue before the federal court was whether Talus had fraudulently joined Franxman to prevent removal, and that issue turned on whether Talus violated the employment agreement by failing to pursue mediation before bringing this action. The federal court did not address the merits of Talus's claims against respondents.

On remand, the district court granted respondents' motion to dismiss for failure to state a claim on which relief can be granted based on its conclusions that the noncompete agreements are void because they conflict with the public policy stated by the FAR clause and executive order 13495 and that the allegations in the complaint are insufficient to support the claims of breach of duty of loyalty and tortious interference with a contract. This appeal followed.

D E C I S I O N

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We "consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "The standard of review is therefore de novo." *Id.*

Under Minn. R. Civ. P. 12.02, a motion to dismiss shall be treated as one for summary judgment when "matters outside the pleading are presented to and not excluded by the court." Although the record contains documents not referred to in the complaint,

the district court treated the motion as a motion to dismiss and not as a summary-judgment motion.

I.

Talus's contract claim is based on allegations that Franxman and Ostrander breached their noncompete agreements, which the district court found unenforceable as a matter of public policy. "A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant." *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). The party asserting a breach-of-contract claim must also prove damages. *Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, 690 N.W.2d 326, 336 (Minn. App. 2004), *review denied* (Minn. Feb. 23, 2005).

"Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade." *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 265 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996). "But restrictive covenants are enforced to the extent reasonably necessary to protect legitimate business interests. Legitimate interests that may be protected include the company's goodwill, trade secrets, and confidential information." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 456 (Minn. App. 2001) (citation omitted).

"Courts may declare a contract void as against public policy, but it is a very delicate power invoked only in cases free from doubt." *State Farm Fire & Cas. Co. v. Schwich*, 749 N.W.2d 108, 114 (Minn. App. 2008) (quotation omitted). There must be

some explicit public policy that is well defined and dominant, and "is to be ascertained by reference to the laws and legal precedents." *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 451 (1945).

The district court concluded that, "[b]ecause the non-compete agreements clearly conflict with the public policy expounded by the FAR Clause, they are void, and Talus Group cannot make a claim that Ostrander and Franxman violated them." In reaching this conclusion, the district court incorrectly determined that "[t]he [FAR] Clause required Talus to release its employees to work for its successor contract[or] to preserve continuity and stability in the government workforce," The FAR clause does not require a contractor to release its employees to work for a successor contractor; it requires only that a contractor "allow as many personnel *as practicable* to remain on the job to help the successor maintain the continuity and consistency of the services required by this contract." (Emphasis added.) Then, "[i]f selected employees are agreeable to the change, the Contractor shall release them at a mutually agreeable date . . . ." Under the FAR clause, when it is not practicable for a contractor to allow an employee to remain on a job, the contractor is not required to release the employee to work for a successor contractor and a noncompete agreement is not inconsistent with the FAR clause.

In *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, the supreme court held that operating a chiropractic clinic in violation of the corporate-practice-of-medicine doctrine did not, as a matter of public policy, void all contracts between the clinic and its patients' insurers. 725 N.W.2d 90, 95 (Minn. 2006). The supreme court stated:

> Not every illegal contract must be voided in order to protect public policy. Rather, we examine each contract to determine whether the illegality has so tainted the transaction that enforcing the contract would be contrary to public policy. As a general rule, a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.
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> . . . .
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> . . . [W]e conclude that categorically voiding the contracts would not serve the public policy reasons underlying the corporate practice of medicine doctrine. Permitting insurance companies to avoid liability under their insurance contracts does little to protect patients from the specter of lay control over professional judgment. We will not void a contract unless it is established that the corporation's actions show a knowing and intentional failure to abide by state and local law. Such a rule is consistent with public policy jurisprudence that requires the court to determine whether the illegality has so tainted the transaction as to make it void under public policy.

Id. at 92-93, 95 (citations and quotations omitted). Under this reasoning, it is necessary to examine Franxman's and Ostrander's roles in Talus to determine whether the FAR clause required that Talus release them to work with Topologe and, in turn, whether their noncompete agreements are inconsistent with the FAR clause.

The district court also determined that "[t]he contract provisions Talus Group claims were violated conflict with clear public policy as described [in executive order 13495]." 74 Fed. Reg. 6, 103 (Jan. 30, 2009). The executive order states:

> It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory

> employees) employed under the predecessor contract *whose employment will be terminated as a result of the award of the successor contract*, a right of first refusal of employment under the contract in positions for which they are qualified.

Executive Order 13495, § 1 (emphasis added).

The district court's determination that the noncompete agreements violate this public policy appears to be based on its finding that, after USFWS informed Talus that its contract would be terminated, Talus "informed Ostrander and Franxman that their employment under the USFWS contract would be terminated along with their employment with Talus Group because it no longer had work for them." But the complaint does not allege that Ostrander's and Franxman's employment with Talus was terminated; it alleges that, after learning that USFWS was not going to renew its contract, Talus informed Ostrander and Franxman

> that they should update their resumes so the Talus Group could place them with another customer. After reminding . . . Ostrander and Franxman of the non-compete provisions in their Employment Agreements, the Talus Group encouraged . . . Franxman and Ostrander to apply for unemployment in case the Talus Group could not immediately place them.

Accepting these allegations as true, as we must, it is reasonable to infer that although Talus lost its contract with USFWS, it did not terminate Ostrander's and Franxman's employment. Instead, Talus directly informed Ostrander and Franxman that once they updated their resumes, it planned to place them with another customer. The fact that Talus encouraged Ostrander and Franxman to apply for unemployment benefits in the event that Talus could not immediately place them with another customer does not mean that Talus terminated their employment. The unemployment-benefits statute

distinguishes "between a discharge and a notice of discharge at a future date." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332-333 (Minn. App. 2009). "[A] notice of discharge does not constitute an immediate discharge when continuing employment in any capacity is still available to the employee who receives the notice of discharge." *Id.* at 333; *see also* Minn. Stat. § 268.095, subd. 5(a) (2010) (providing that a discharge occurs only "when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity"). Talus's notification to Ostrander and Franxman that it was possible that Talus could not immediately place them with another customer does not mean that a discharge occurred. Because the allegations in the complaint support the reasonable inference that Ostrander's and Franxman's employment was not terminated as a result of the award of the successor contract to Topologe, their noncompete agreements did not conflict with the public policy described in executive order 13495, and the district court erred in dismissing the complaint because the noncompete agreements are void as contrary to public policy.

II.

Talus's claims against Franxman and Ostrander for breach of the duty of loyalty and against Topologe for tortious interference with contract are based on allegations that Topologe solicited Franxman and Ostrander before winning the USFWS contract and that Franxman and Ostrander agreed to work for Topologe if it won the contract. Minnesota recognizes two tortious-interference claims: "1) tortious interference with an existing contract; or 2) tortious interference with a prospective business relation or, as it is

sometimes referred to, a prospective economic advantage." *Hern v. Bankers Life Cas. Co.*, 133 F. Supp. 2d 1130, 1137 (D. Minn. 2001).

To establish a claim of tortious interference with a contractual relationship, a plaintiff must prove five elements: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (quotation omitted).

Three elements must be established to prove a claim of tortious interference with prospective economic advantage: a plaintiff must show that (1) the defendant "intentionally and improperly interfere[d] with [the] prospective contractual relation," (2) which caused "pecuniary harm resulting from loss of the benefits of the relation," and (3) the interference either (a) induced or otherwise caused a third person not to enter into or continue the prospective relation or (b) prevented the continuance of the prospective relation. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982).

Minnesota courts have stated generally that "[a]ll employees, to a lesser or greater extent, have a fiduciary relationship to their employers, . . . with a duty to act in the interests of the employer and not as an adversary." *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 858 (Minn. 1985); *see also Sanitary Farm Dairies, Inc. v. Wolf*, 261 Minn. 166, 175, 112 N.W.2d 42, 48 (1961) (soliciting business of an employer prior to leaving employment breaches employee's duty of loyalty); *St. Cloud Aviation, Inc. v. Hubbell*, 356 N.W.2d 749, 751 (Minn. App. 1984) (referring a customer to a competitor breaches fiduciary duty of salesperson).

The district court concluded:

> Talus Group alleges no facts to support an inference that because Topologe won the USFWS contract it had engaged in wrongdoing with Ostrander and Franxman. Any such inference would be unreasonable and based only upon Talus Group's own conclusions about what may have caused it to lose its USFWS contract.

This conclusion fails to recognize the effect of the FAR clause on Topologe's bid to obtain the USFWS contract. Under the clause, it was possible that Talus would have to release Ostrander and Franxman from their employment, but only if it was practicable for Talus to do so. Consequently, Topologe could not perform under the USFWS contract unless it either had other employees who could do the work that Ostrander and Franxman had been doing or it was sure that Ostrander and Franxman would work for it if it obtained the contract. Talus alleged in the complaint that Topologe did not have other employees that could do the work, that Ostrander and Franxman agreed to stay on with Topologe prior to the termination of Talus's contract, and that Topologe would not have been awarded the contract without Ostrander's and Franxman's services. These allegations support an inference that Topologe interfered with Talus's contractual relationships with Ostrander and Franxman when it sought assurances that Franxman and Ostrander would work for Topologe if it obtained the USFWS contract and, based on these assurances, sought the contract. The allegations also support an inference that Ostrander and Franxman breached their duties to act in Talus's interests when they assured Topologe that they would work for it if it obtained the USFWS contract and, in turn, made it possible for Topologe to seek the contract.

Citing *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010), respondents argue that the allegations in the complaint are insufficient because they are made "upon information and belief," and facts based merely upon information and belief are insufficient to survive a motion to dismiss. But *Bahr* does not address that issue. *Bahr* states: "[A] legal conclusion in the complaint is not binding on us. A plaintiff must provide more than labels and conclusions." *Id.* (citation omitted). The complaint provides more than labels and legal conclusions. It alleges that before USFWS terminated Talus's contract, Ostrander and Franxman indicated to Topologe that they would stay at USFWS if Topologe replaced Talus as the contractor. This is the factual basis for Talus's claims. "The 'primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based.'" *Goeb v. Tharaldson*, 615 N.W.2d 800, 818 (Minn. 2000) (quoting *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997)). The complaint gives respondents fair notice of the theories on which Talus's claims are based. *See also Arista Record, LLC v. Doe 3*, 604 F.3d 110, 120 (2nd Cir. 2010) (plaintiff is not prevented from pleading facts alleged upon information and belief when facts are peculiarly within defendant's possession and control).

It may be that Topologe cannot prove any of its allegations, but it does not need to do so to survive a motion to dismiss for failure to state a claim. *See Bodah*, 663 N.W.2d at 553 (stating that when reviewing a 12.02 (e) dismissal, facts alleged in complaint must be accepted as true). According to the complaint, rather than obtaining the USFWS contract and then going through the FAR-clause procedure to hire Ostrander and

Franxman, Topologe arranged in advance with Ostrander and Franxman to stay on if Topologe got the contract, which made it possible for Topologe to get the contract. These allegations are sufficient to support Talus's tortious-interference and breach-of-duty-of-loyalty claims. The district court erred by dismissing these claims.

Reversed and remanded.

MINGE, Judge (dissenting)

I respectfully dissent. The complaint here is detailed. The district court considered this detail, including letters from Talus Group to Franxman and Ostrander submitted as a part of their motion to dismiss. I agree that on a rule 12 motion we accord the complainant the presumption that matters pleaded can be proven. But this does not mean that we are constrained to accept conclusions and speculation in appellant's complaint. *See Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) ("A plaintiff must provide more than labels and conclusions.").

The parties dispute what is properly considered as part of the complaint. Franxman and Ostrander included a variety of material with an affidavit that accompanied their dismissal motion. Relevant to this dissent are discharge letters dated September 28, 2009 that the Talus Group sent to them. Paragraph 18 of the complaint purports to summarize a conversation the Talus Group had in September 2009 with Franxman and Ostrander about the status of their jobs. I do not find it error for the district court to consider the discharge letters dated September 28, 2009.[1]. *See N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004) (providing that a district court may consider documents and oral statements referenced in a complaint without converting a motion to dismiss into a motion for summary judgment);

[1] I note the complaint dates USFWS's notification of nonrenewal of the contract as September 22 and states that Talus Group's meeting with respondents was shortly thereafter. The September 28 letter from Talus Group dates the USFWS notice and conversation with employees as occurring on September 21. Neither party claims that the date discrepancy is material. It appears to be harmless error by either the corporate officer of Talus Group signing the letter or the persons involved in preparation of appellant's complaint.

Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 739 n. 7 (Minn. 2000) (allowing consideration of documents and oral statements referenced in complaint). Here, the September 28, 2009 letters drafted by appellant Talus purport to summarize the earlier conversation that it had with them.

The complaint admits that Talus Group advised Franxman and Ostrander that they should apply for unemployment benefits, in case Talus could not place them with another Talus customer. Even though it was drafted six months after the events, the complaint does not allege that Talus had any other customer or position for Franxman or Ostrander. It does not allege that it was not "practicable" for Talus to allow Franxman and Ostrander to continue to work for the USFWS. The only reasonable inference was that there is not more Talus-related work. This is bluntly stated in Talus's discharge letters dated September 28.

From the complaint it appears that Franxman and Ostrander were federal contract workers to whom Talus Group had no further obligations after they were laid off. Aside from the interest of the USFWS in retaining their services, Franxman and Ostrander had no rights. Their contracts with the Talus Group, which are exhibits to the complaint, make it abundantly clear that Franxman and Ostrander were at-will employees and that this at-will status could not be changed by any oral statement or even written statement unless signed by both the employee and an officer of Talus. To find a continuing employment relationship in this circumstance is at variance with the complaint and is speculative. Franxman and Ostrander's choice was either: (1) Apply for unemployment benefits as suggested by Talus Group, with eligibility for benefits requiring that they

actively seek and accept employment, Minn. Stat. § 268.085, subd. 1(4), (5) (2010); or (2) Not work and without income and without any employment status, hoping that Talus Group would find them some work; or (3) Continue to work at the USFWS, now under the contract between the federal government and Topologe.

We should not read into this detailed complaint, a novel unemployed-employment relationship between these two at-will employees and Talus Group that allows Talus to engage in a litigation odyssey. Nor should we allow Talus to manipulate its noncompete clause that virtually violates both its contract with the federal government and federal policy as set forth in an executive order. This approach favors noncompetition agreements and is inconsistent with the established policy of Minnesota courts. *See Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 265 (Minn. App. 1996) ("Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade."), *review denied* (Minn. Sept. 20, 1996).

The record before the district court includes the federal contract provisions that are a legal obligation of Talus in all of its work for the USFWS including Talus's contracts with Franxman and Ostrander. Also part of the record is the federal policy regarding contract employees. The federal contract is referred to in the complaint. Its provisions are designed to protect the federal government's interest in continuity and stability in its workforce. The most logical inferences here are that Talus Group was an "at-will" contractor with the federal government, its USFWS contract was not renewed, its two employees (Franxman and Ostrander) appreciated having a job, these employees were aware of the federal policies regarding continuity of contract workers, and they were

willing to respect them. I would not infer that Talus is the victim of a nefarious conspiracy. Drawing such an inference is speculation. The district court concluded that because Talus Group's claims clash with its contract with the federal government and with federal policy, those claims should be dismissed.

Based on the pleadings and the record, there does not appear to be a legally sustainable basis for enforcing Talus Group's restrictions on Franxman and Ostrander as contract employees with the federal government. This litigation that has been dismissed in federal courts for want of diversity jurisdiction and on the merits by the district court. I would affirm.